

— March 20, 2002 —



Acquisition

Buy American Act Issues on
Procurements of Military Clothing
(D-2002-066)

— Department of Defense —
Office of the Inspector General

Quality

Integrity

Accountability

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<p>Abstract</p> <p>We conducted the audit in response to a tasking in the House Committee on Armed Services Report on the Floyd D. Spence National Defense Authorization Act for FY 2001. The Committee Report expressed concern over the number of violations of the Buy American Act identified in Inspector General, DoD, Report No. 99-023, Procurement of Military Clothing and Related Items by Military Organizations, October 29, 1998. Of the 256 contracts reviewed 151 (59 percent) did not include the appropriate contract clause. The Committee tasked the Inspector General to conduct a followup audit to evaluate compliance with the Buy American Act for procurements of military clothing and related items by military installations during FYs 1998 and 1999 and to evaluate the actions taken after the 1998 audit to improve compliance with the Buy American Act. During FYs 1998 and 1999, 144 military installations made at least 3,875 procurements of military clothing and related items valued at \$1.16 billion. This report discusses 698 of the procurements, valued at \$136.7 million, by 65 military installations. The report does not discuss procurements by the Defense Supply Center Philadelphia, a Defense Logistics Agency field unit that procures about \$1 billion of military clothing and related items annually.</p>		
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Acronyms

AFB	Air Force Base
BPA	Blanket Purchase Agreement
DCADS	Defense Contract Action Data System
DCN	DFARS Change Notice
DFARS	Defense Federal Acquisition Regulation Supplement
FAC	Federal Acquisition Circular
FAR	Federal Acquisition Regulation
FISC	Fleet and Industrial Supply Center
FSC	Federal Supply Classification
GSA	General Service Administration
IDIQ	Indefinite Delivery Indefinite Quantity
NAFTA	North American Free Trade Agreement
NCBC	Naval Construction Battalion Center
NSWC	Naval Surface Warfare Center
U.S.C.	United States Code
USDB	United States Disciplinary Barracks
USPFO	United States Property and Fiscal Office
USSOCOM	United States Special Operations Command



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March 20, 2002

MEMORANDUM FOR ASSISTANT SECRETARY OF THE AIR FORCE
(FINANCIAL MANAGEMENT AND COMPTROLLER)
AUDITOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: Audit Report on Buy American Act Issues on Procurements of Military Clothing (Report No. D-2002-066)

We are providing this audit report for review and comment. We performed the audit in response to a tasking in the House Committee on Armed Services Report on the Floyd D. Spence National Defense Authorization Act for FY 2001. We considered management comments on a draft of this report in preparing the final report.

DoD Directive 7650.3 requires that all recommendations be resolved promptly. As a result of an opinion received from the Office of General Counsel, DoD, we revised Recommendation 2. to include only procurements that did not comply with the Berry Amendment as potential Antideficiency Act violations. The Army and Air Force comments on Recommendation 2. were not responsive. We request that the Army and Air Force provide additional comments on Recommendation 2. in response to the final report. We request that the Army and the Air Force provide the comments by May 20, 2002.

We appreciate the courtesies extended to the audit staff. Questions on the audit should be directed to Mr. Keith West at (703) 604-9202 (DSN 664-9202) (rwest@dodig.osd.mil) or Mr. Peter I. Lee at (703) 604-9333 (DSN 664-9333) (plee@dodig.osd.mil). See Appendix H for the report distribution. The audit team members are listed inside the back cover.

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Office of the Inspector General, DoD

Report No. D-2002-066

(Project No. D2001CH-0046)

March 20, 2002

Buy American Act Issues on Procurements of Military Clothing

Executive Summary

Introduction. We conducted the audit in response to a tasking in the House Committee on Armed Services Report on the Floyd D. Spence National Defense Authorization Act for FY 2001. The Committee Report expressed concern over the number of violations of the Buy American Act identified in Inspector General, DoD, Report No. 99-023, "Procurement of Military Clothing and Related Items by Military Organizations," October 29, 1998. Of the 256 contracts reviewed 151 (59 percent) did not include the appropriate contract clause. The Committee tasked the Inspector General to conduct a followup audit to evaluate compliance with the Buy American Act for procurements of military clothing and related items by military installations during FYs 1998 and 1999 and to evaluate the actions taken after the 1998 audit to improve compliance with the Buy American Act. During FYs 1998 and 1999, 144 military installations made at least 3,875 procurements of military clothing and related items valued at \$1.16 billion. This report discusses 698 of the procurements, valued at \$136.7 million, by 65 military installations. The report does not discuss procurements by the Defense Supply Center Philadelphia, a Defense Logistics Agency field unit that procures about \$1 billion of military clothing and related items annually.

Objectives. The objectives of the audit were to determine whether contracting officers complied with the Buy American Act and the Berry Amendment when they procured military clothing and related items and to evaluate DoD actions taken after the 1998 audit to improve compliance with the Buy American Act. In addition, the audit evaluated the adequacy of the management control program as applicable to the procurement of military clothing and related items.

Results. DoD contracting officers continued to violate the Buy American Act on FYs 1998 and 1999 procurements of military clothing and related items. Of 698 contracts reviewed, 416 (60 percent) did not include the appropriate contract clause to implement the Buy American Act or the Berry Amendment. Contracting officers at 13 military installations procured military clothing and related items that were manufactured or produced abroad without determining whether items manufactured in the United States or a qualifying country were available, as required by the Buy American Act, or items manufactured in the United States were available, as required by the Berry Amendment. As a result, contracting officers awarded 28 contracts to contractors that supplied \$593,004 worth of items manufactured abroad that may have been available from contractors supplying items manufactured in the United States. The noncompliance with the Berry Amendment resulted in three potential violations of the Antideficiency Act because the contracts were either funded directly with appropriated funds or working capital funds that were reimbursed with appropriated funds, which are not available for the procurement of foreign-made items. On January 18, 2002, the Office of General Counsel, DoD, opined that a violation of the Buy American Act may give rise to a potential violation of the Antideficiency Act. The Office of General Counsel further opined that the Buy American Act applied to procurements of commercial items, but that Defense Federal Acquisition Regulation Supplement

215.503.(a)(xi) created sufficient ambiguity to make a contrary conclusion reasonable. Therefore, the Office of General Counsel made its opinion effective prospectively only and declined to treat any past violations of the Buy American Act (includes the 25 Buy American Act violations discussed in this report) as potential violations of the Antideficiency Act. We revised the finding and recommendation concerning Antideficiency Act violations accordingly.

The DoD corrective actions taken after the prior audit should have affected contracts awarded in FY 1999. We saw no significant reductions in violations of Buy American Act and Berry Amendment procedures for those contracting actions. For details of the audit results, see the Finding section of the report.

Summary of Recommendations. We recommend that the Acquisition Executives for the Army, Navy, Air Force, and U.S. Special Operations Command establish review procedures or additional training for solicitations and contract awards for clothing procurements subject to the Buy American Act and the Berry Amendment. We recommend that the Assistant Secretaries (Financial Management and Comptroller) of the Army and Air Force investigate, for the contracts under their cognizance, the three potential Antideficiency Act violations.

Management Comments. The Army Acquisition Executive, on February 14, 2002, issued a memorandum to its Principal Assistants responsible for contracting reminding them of Buy American Act and Berry Amendment restrictions and enjoining them to comply on future acquisitions. The Army nonconcurred that potential Antideficiency Act violations occurred when they did not comply with the Berry Amendment because the delivery orders did not exceed \$100,000. The Navy nonconcurred with establishing special procedures for clothing procurements but stated that Navy activities will conduct refresher training on Buy American Act responsibilities. Additionally, the Navy included a review of procurements involving Buy American Act and Berry Amendment restrictions in its triennial procurement performance management assessments of field activities and will conduct on-site training if deficiencies are identified. The Air Force stated that each major command has developed, or is in the process of developing, training and tools to help ensure compliance with the Buy American Act and the Berry Amendment. The Air Force is also developing a comprehensive training module on the laws and will deploy the training across the Air Force by July 12, 2002. The Air Force also stated that it has initially found that there is no reason to conclude that the Air Force Academy committed an Antideficiency Act violation when it did not comply with the Berry Amendment because no delivery order exceeded \$100,000. The United States Special Operations Command (USSOCOM) nonconcurred with the report stating that the 34 USSOCOM actions reviewed indicate that the problems with applying the foreign acquisitions statutes are not as widespread as outlined in the report. However, USSOCOM plans to conduct training on the proper handling of Buy American Act and Berry Amendment issues. See the Finding section for a discussion of management comments on the recommendations; see Appendix F for a discussion of management comments on the finding; and see the Management Comments section for the complete text of management comments.

Audit Response. The alternative actions taken and planned by the Army, Navy, Air Force, and USSOCOM are responsive and satisfy the intent of the recommendation to establish special procedures for military clothing procurements. The Army and Air Force comments on the investigation of the potential Antideficiency Act violations are not responsive. We request that the Army and the Air Force provide additional comments concerning the potential Antideficiency Act violations by May 20, 2002.

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Background

Floyd D. Spence National Defense Authorization Act for FY 2001. We performed this audit in response to the House Committee on Armed Services Report on the Floyd D. Spence National Defense Authorization Act for FY 2001. The Committee expressed concern over the number of violations of the Buy American Act identified in Inspector General, DoD, Report No. 99-023, “Procurement of Military Clothing and Related Items by Military Organizations,” October 29, 1998. The Committee tasked the Inspector General to conduct a followup audit of procurements of military clothing and related items in excess of the micro-purchase threshold by military installations during FYs 1998 and 1999 to determine the extent to which the installations did not comply with the Buy American Act. The Committee also requested that the Inspector General evaluate the actions taken by DoD to improve compliance with the Buy American Act after Report 99-023 was issued.

The Buy American Act. The Buy American Act, enacted March 3, 1933, restricts foreign access to U.S. Government procurements by giving preference to domestically produced or manufactured products. The Federal Acquisition Regulation (FAR) part 25, “Foreign Acquisition,” and the Defense Federal Acquisition Regulation Supplement (DFARS) part 225, “Foreign Acquisition,” implement the Buy American Act.

The Berry Amendment. From FYs 1942 through 1993, every DoD appropriations act contained a provision that placed domestic source restrictions on DoD procurements of such items as food, clothing, fabrics, specialty metals, and hand or measuring tools. The provision has been codified under section 2533a, title 10, United States Code (10 U.S.C. 2553a). DFARS 225.7002-1, “Restrictions,” implements the Berry Amendment. The DFARS provision requires the items specified in the Berry Amendment to be grown or produced in the United States or its possessions. To comply with the law, DoD contracting officers must determine that the offered item is produced in the United States or its possessions before awarding the contract.

Table 1 shows the dollar parameters for implementation of the Buy American Act (the Act) and the Berry Amendment (the Amendment) in procurements of military clothing and related items. Solicitations and contracts should specify the related DFARS references shown in the table.

Table 1. DoD Procurement Applications

<u>Procurement Value</u>	<u>Applicable Statute</u>	<u>DFARS Reference</u>
\$2,500 to \$100,000	Buy American Act	DFARS 252.225-7000 DFARS 252.225-7001
More than \$100,000	Berry Amendment	DFARS 252.225-7012

The FAR and DFARS were revised after the contracts discussed in this report were awarded. The revisions do not significantly alter the guidance for implementing the Buy American Act and the Berry Amendment within DoD, but the numbering of some sections, subsections, and clauses changed. The FAR and DFARS guidance that was in effect when the contracts were awarded is cited in this report. See Appendix B for a list of the FAR and DFARS guidance cited in the report, the current guidance, and a discussion of the guidance.

Categories of Military Clothing and Related Items. A December 1997 report prepared by the Military Uniform Task Force under the direction of the Assistant Secretary of Defense (Force Management Policy) and the Federal Procurement Data System Product Service Codes classifies military clothing and related items into the following categories.

- Mandatory: Uniform and clothing items that members are required by Military Department regulations to possess at all times.
- Issue: Mandatory uniform and clothing items issued to recruits at basic training.
- Optional: Uniform and clothing items purchased by military members and worn at their option in accordance with their Military Department regulations.
- Organizational: Protective or specialized uniforms and clothing items that are purchased by an organization and provided to members for a specific purpose or operational need.
- Related: Individual equipment items such as duffel bags, ammunition belts, pistol belts, packboards, sleeping bags, sunglasses, snowshoes, swords, and scabbards.

Primary DoD Sources for Military Clothing and Related Items. There are two primary DoD sources for military clothing and related items: the Defense Supply Center Philadelphia, and clothing sales stores operated by the Military Exchanges, including the Army and Air Force Exchange Service, the Navy Exchange Service Command, and the Marine Corps Exchange System. The Defense Supply Center Philadelphia spends about \$1 billion annually to procure mandatory and issue clothing items that military members are required to maintain throughout their careers, as well as organizational clothing, and related items. The Defense Supply Center Philadelphia adds a surcharge (about 11.3 percent in FY 1999) to items it procures to cover its operating expenses. The Military Exchanges procure optional items that military members may, but are not required to, possess. In addition to optional items, the Navy Exchange Service Command procures mandatory uniform items for Navy officers and master, senior, and chief petty officers. The Military Exchanges manage the military clothing sales stores that provide Defense Supply Center Philadelphia procured items as replacements, as well as optional uniform and related items approved by the Military Departments.

Procurements of Military Clothing and Related Items by Military Installations. According to the Defense Contract Action Data System (DCADS), 144 installations executed 3,203 contract actions valued at more than \$25,000 each for special purpose clothing, footwear, and individual equipment items during FYs 1998 and 1999. The Air Force Academy identified three additional contract actions that were not in the DCADS system. The total value of the 3,206 contract actions was \$1.15 billion. Additionally, 44 military installations identified 669 contract actions for military clothing and related items valued between \$2,500 and \$25,000. The total value of the 669 contract actions was about \$5.5 million. The number and value of all purchases of military clothing items between \$2,500 and \$25,000 could not be determined because DoD organizations are not required to report details on procurements under \$25,000 to a central database.

We selected for review 421 of the 3,206 contract actions valued over \$25,000 and 277 of the 669 contract actions valued between \$2,500 and \$25,000. The total value of the 698 contract actions reviewed was about \$136.7 million. The 698 contract actions did not include mandatory uniform items (shirts, trousers, coats, headwear, etc.) that are procured by the Defense Supply Center Philadelphia and requisitioned by military organizations for issue to military personnel. See Appendix A for additional information on the universe of procurements of military clothing and related items and the sample of procurements selected for review.

Objectives

The objectives of the audit were to determine whether contracting officers complied with the Buy American Act and the Berry Amendment when they procured military clothing and related items and to evaluate DoD actions taken after the 1998 audit to improve compliance with the Buy American Act. In addition, the audit evaluated the adequacy of the management control program as applicable to the procurement of military clothing and related items. See Appendix A for a discussion of the audit scope and methodology, our review of the management control program, and a list of prior audit coverage related to the audit objectives.

Compliance with Buy American Act and Berry Amendment

DoD contracting officers continued to violate the Buy American Act and the Berry Amendment on procurements of military clothing and related items during FYs 1998 and 1999*. We reviewed 698 contract actions awarded by 65 military installations. The contracting officers did not include the appropriate clause to implement the Buy American Act or the Berry Amendment in 416 (60 percent) of the 698 contract actions. Contracting officers at 13 of the 65 military installations procured military clothing and related items manufactured or produced abroad without first determining, as appropriate, whether items manufactured in the United States or a qualifying country were available, as required by the Buy American Act, or items manufactured in the United States were available, as required by the Berry Amendment. The contracts were issued without the appropriate clauses, and the items were procured because contracting officers were not familiar with or did not understand the Buy American Act, the Berry Amendment, and the FAR and DFARS implementing guidance. Further, legal and technical reviews of the solicitations and contracts were either not performed or failed to ensure compliance with the Act or Amendment. Additionally, contracting officers often focused on satisfying customer requests without considering the Act or Amendment. As a result, contracting officers awarded 28 contracts to contractors that supplied \$593,004 worth of items manufactured abroad that might have been procured from contractors supplying items manufactured in the United States. The noncompliance with the Berry Amendment resulted in three potential violations of the Antideficiency Act. The noncompliance with the Buy American Act could have resulted in 25 additional potential Antideficiency Act violations. The corrective actions taken after the prior audit should have affected contracts awarded in FY 1999. We saw no significant reductions in violations of the Buy American Act and the Berry Amendment procedures for those contracting actions.

On January 18, 2002, the Office of General Counsel, DoD, opined that a violation of the Buy American Act may give rise to a potential violation of the Antideficiency Act. The Office of General Counsel further opined that the Buy American Act applied to procurements of commercial items, but because the Defense Federal Acquisition Supplement 215.503(a)(xi) created sufficient ambiguity to make a contrary conclusion reasonable, the Office of General Counsel would make its interpretation effective only prospectively. Accordingly, it declined to treat past violations of the Buy American Act (including the 25 violations discussed in this report) as potential violations of the Antideficiency Act.

* In Report No. 99-023, “Procurement of Military Clothing and Related Items by Military Organizations,” we reported that 151 of 256 audited FY 1996 and FY 1997 contracts (59 percent) violated the Act or the Amendment. For that reason, Congress requested followup with further audit work.

Contract Actions Reviewed During the Audit

We reviewed 698 contract actions awarded by 65 military installations during FYs 1998 and 1999. Of the 698 contract actions reviewed, 532 (valued between \$2,500 and \$100,000) were subject to the Buy American Act, and 166 valued at (\$100,000 or more) were subject to the Berry Amendment. The prior audit reviewed 256 contract actions awarded by 70 military installations during FYs 1996 and 1997. Of the 256 contract actions reviewed during the prior audit, 201 were subject to the Buy American Act, and 55 were subject to the Berry Amendment. Table 2 identifies the number and the range of values of contract actions reviewed by DoD Components for the current and prior audits.

Table 2. Contract Actions Reviewed by DoD Component and Values

	<u>Number of Installations</u>	<u>\$2,500 to \$25,000 ^{1/}</u>	<u>\$25,000 to \$100,000 ^{1/}</u>	<u>More Than \$100,000 ^{2/}</u>	<u>Total</u>
Army					
Current Audit	24	58	85	68	211
Prior Audit	15	3	37	23	63
Navy					
Current Audit	8	34	47	50	131
Prior Audit	14	14	22	9	45
Air Force					
Current Audit	29	165	115	33	313
Prior Audit	37	55	68	19	142
Marine Corps					
Current Audit	1	0	1	8	9
Prior Audit	4	0	2	4	6
USSOCOM ^{3/}					
Current Audit	3	12	15	7	34
Prior Audit	0	0	0	0	0
Total					
Current Audit	65	269	263	166	698
Prior Audit	70	72	129	55	256

^{1/} Subject to Buy American Act

^{2/} Subject to Berry Amendment

^{3/} United States Special Operations Command

Use of Buy American Act and Berry Amendment Contract Clauses

The FAR and DFARS cite several references for incorporating the Buy American Act and Berry Amendment provisions into contracts and solicitations for commercial items and other than commercial items. The audit determined that for:

- 356 of the 532 contract actions subject to the Buy American Act, the contracting officers did not include the correct clause in the contracts and
- 60 of the 166 contract actions that were subject to the Berry Amendment, contracting officers did not include DFARS 252.225-7012, “Preference for Certain Domestic Commodities,” in the contracts.

We believe the complexity of the guidance and the number of exemptions, exceptions, and waiver authorities make it difficult for contracting officers to understand what is necessary to meet the requirements of the Buy American Act and the Berry Amendment.

Buy American Act Procurements. The audit determined that contracting officers for 356 of the 532 contract actions subject to the Buy American Act were not sufficiently familiar with the Buy American Act and guidance in the FAR and DFARS to ensure compliance. The contracting officers for 149 of the 532 contract actions were sufficiently familiar with the guidance to include the correct Buy American Act clause in the contracts, request the required certifications, or inquire about the origin or manufacture of the clothing items. For the remaining 27 contract actions, we could not determine whether the appropriate clause was included because the contract files were unavailable or incomplete. Also, legal and technical reviews of the solicitations and contracts were either not performed or did not ensure that the solicitations and contracts conformed to the Buy American Act. Of the 532 contract actions, 25 actions resulted in procurements of items valued at \$330,281 from nonqualifying countries that may have been available from contractors supplying items manufactured in the United States or a qualifying country. Of the 25 actions that resulted in procurements of items manufactured in nonqualifying countries, 2 actions were awarded to another DoD installation, which purchased and supplied items manufactured in nonqualifying countries. (See the discussion of Fort Knox contracts DABT23-98-P-1238 and DABT23-99-P-0766 in Appendix D for additional details.) Contractors on 481 contract actions supplied items manufactured in the United States or a qualifying country. We could not determine the country of origin for the remaining 26 contract actions. The prior audit determined that the contracting officers for 131 of the 201 contract actions subject to the Buy American Act did not include the correct Buy American Act clause in the contracts. The contracting officers for the other 70 contract actions were sufficiently familiar with the guidance to include the correct Buy American Act clause in the contracts. Of the 131 contract actions, 12 actions resulted in procurements of items valued at \$334,546 from nonqualifying countries that may have been available from contractors supplying items manufactured in the United States or a qualifying country. Table 3 shows information on contract actions subject to the Buy American Act for the current and prior audits.

Table 3. Information on Contract Actions Subject to the Buy American Act

	<u>Number</u>	<u>Value</u>	<u>Percent of Total</u>
Contract Actions Reviewed			
Current Audit	532	\$13.7 million	100
Prior Audit	201	\$6.4 million	100
Contract Actions that Did Not Contain the Buy American Act Clause			
Current Audit	356	\$9.4 million	67
Prior Audit	131	\$3.7 million	65
Contract Actions for Items Manufactured in Nonqualifying Countries (Did Not Comply with the Buy American Act)			
Current Audit	25	\$330,281*	5
Prior Audit	12	\$334,546*	6

*Depicts funds obligated for items made in nonqualifying foreign countries, not necessarily total contract value

On 24 of the 25 contract actions that resulted in procurements of items made in nonqualifying foreign countries, the contracting officers did not include the correct DFARS clause in the contracts. The contracting officers for the 24 contracts did not require the offerors to execute the required Buy American Act-Balance of Payments Program Certificate. The other contract action contained the correct clause, but the contracting officer did not enforce it. The contracting officers did not give preference to domestic end products when they evaluated offers and did not obtain a determination that the procured items were not reasonably available from domestic sources before awarding the contract actions to contractors who supplied items that were manufactured in nonqualifying countries. The contracting officers for four contracts focused on satisfying customer requests (usually supply officials) for specific items without determining if the items complied with the Buy American Act. The 25 contracts that did not comply with the Buy American Act are shown in Table 4, and each procurement is discussed in detail in Appendix D.

Table 4. Contracts That Did Not Comply With the Buy American Act

<u>Organization</u>	<u>Contract Number</u>	<u>Value*</u>	<u>Item Description</u>	<u>Country of Origin</u>
<u>Army</u>				
Fort Knox	DABT23-98-P-1238	\$ 15,785	T-shirts	Mexico
Fort Knox	DABT23-99-M-0390	4,666	Polo-shirts	Honduras
Fort Knox	DABT23-99-P-0766	26,778	T-shirts	Mexico
Military Academy	DAAG60-98-P-0815	5,795	Blouses	China
Military Academy	DAAG60-99-P-0245	5,320	Blouses	China
Tobyhanna Army Depot	DAAC71-96-A0318/ 0007 and 0009	8,594	Gloves	Malaysia
<u>Navy</u>				
FISC, Bremerton	N00406-98-D-5060	2,852	Gloves	Mexico
FISC, Bremerton	N00406-99-M-2951	4,092	Gloves	China
FISC, Bremerton	N00406-99-M-2820	27,699	Gloves	China
FISC, Pearl Harbor	N00604-99-M-A430	2,781	Jackets	China
FISC, San Diego	N00244-99-D0015	35,651	Wetsuits	Japan
<u>Air Force</u>				
Dover AFB	F07603-98-P-0431	2,694	Gloves	S. Korea
Dover AFB	F07603-99-P-0101	30,150	Gloves	S. Korea
Edwards AFB	F04700-99-P-0091	13,662	Gloves	S. Korea
Edwards AFB	F04700-99-P-0143	2,613	Gloves	S. Korea
Edwards AFB	F04700-99-P-0147	5,489	Gloves	S. Korea
Grand Forks AFB	F32605-98-P-0129	51,000	Gloves	China
Grand Forks AFB	F32605-98-P-0222	7,655	Gloves	China
Grand Forks AFB	F32605-99-P-0034	35,504	Gloves	China
Maxwell AFB	F01600-99-P-0428	15,288	Jackets	Taiwan
Maxwell AFB	F01600-99-P-0366	4,288	Safety Shoes	China
Maxwell AFB	F01600-99-P-0372	14,313	Jackets	Taiwan
Peterson AFB	F05604-98-P-1860	3,024	T-shirts	Mexico
Peterson AFB	F05604-98-P-2471	4,588	Jerseys	Mexico
Total		\$330,281		
FISC - Fleet and Industrial Supply Center AFB - Air Force Base				
*Depicts funds obligated for items made in nonqualifying foreign countries, not necessarily total contract value				

Berry Amendment Procurements. The contracting officers for 60 of the 166 contract actions subject to the Berry Amendment were not sufficiently familiar with the DFARS Berry Amendment guidance to ensure compliance, and legal and technical reviews were either not performed or not adequate to identify the noncompliance. The contracting officers for 103 contract actions were sufficiently familiar with the guidance to include DFARS 252.225-7012 in the contracts. For the remaining three contract actions, we could not determine whether the appropriate clause was included because the contract files were unavailable or incomplete. On 20 of the 60 contract actions, the contracting officers did not implement the Berry amendment because the actions were orders under a General Services Administration Federal Supply Schedule. The General Services Administration does not use DFARS 252.225-7012 in Federal Supply Schedule because the Berry Amendment applies only to DoD. Table 5 shows information on contract actions subject to the Berry Amendment for the current and prior audits.

Table 5. Information on Contract Actions Subject to the Berry Amendment			
	<u>Number</u>	<u>Value</u>	<u>Percent of Total</u>
Contract Actions Reviewed			
Current Audit	166	\$123.0 million	100
Prior Audit	55	\$36.2 million	100
Contract Actions that Did Not Contain the Berry Amendment Clause			
Current Audit	60	\$30.7 million	36
Prior Audit	20	\$21.3 million	36
Contract Actions for Items Manufactured In Foreign Countries (Did Not Comply With the Berry Amendment)			
Current Audit	3	\$0.26 million*	2
Prior Audit	4	\$1.1 million*	7

*Depicts funds obligated for items made in foreign countries, not necessarily total contract value

For two of the three contract actions that resulted in procurements of items manufactured in nonqualifying foreign countries, the contracting officer did not include DFARS clause 252.225-7012 in the solicitations and contracts. For the third contract action, the contracting officer included the clause but did not enforce it. The contracting officers generally responded to customer requests for specific items without determining whether the items complied with the Berry Amendment. Additionally, the contracting officers did not obtain from the applicable Secretary of the Military Department the determination required by DFARS 225.7002-2(a), “Exceptions,” that the items are not available in satisfactory quality and sufficient quantity grown or produced in the United States or its possessions at United States market prices before awarding the contracts to contractors who supplied items that

were manufactured in foreign countries. The three contracts that did not comply with the Berry Amendment are shown in Table 6, and each procurement is discussed in detail in Appendix D.

Table 6. Contracts That Did Not Comply With the Berry Amendment

<u>Organization</u>	<u>Contract Number</u>	<u>Value*</u>	<u>Item Description</u>	<u>Country of Origin</u>
Army				
Letterkenny Army Depot	DAAC67-97-D-0002	\$ 84,136 (24 orders)	Safety Shoes	China
Air Force				
Air Force Academy	F05611-99-D-M502	107,349 (2 orders)	Athletic Shoes	China
Air Force Academy	F05611-98-D-M001	<u>71,238</u> (2 orders)	Athletic Shoes	China
Total		\$262,723		

*Depicts funds obligated for items made in foreign countries, not the total contract value. The estimated contract value of each of the three contracts exceeded the \$100,000 Berry Amendment threshold.

Potential Antideficiency Act Violations

The noncompliance with the Berry Amendment on three contracts resulted in three potential violations of the Antideficiency Act, section 1341(a)(1)(A), title 31, U.S.C. These potential violations occurred because the contracts were either funded directly with appropriated funds or working capital funds that were reimbursed with appropriated funds that are not available for the procurement of the foreign-made items. The orders under the three contracts included \$262,723 for items that were manufactured in nonqualifying foreign countries.

The Berry Amendment states in part:

. . . no part of any appropriation or any other funds available to the Department of Defense, except for purchases for amounts not greater than the simplified acquisition threshold . . . shall be available for the procurement of any item of food, clothing . . . not produced in the United States or its possessions.

The Antideficiency Act (31 U.S.C. 1341) states in part:

(a)(1) An officer or employee of the United States Government . . . may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; . . .

The DoD Financial Management Regulation 7000.14R, “Administrative Control of Funds and Antideficiency Act Violations,” volume 14, states in part:

. . . violation of 31 U.S.C. 1341 (a)(1)(A) may occur when statutory limitations on the purpose for which an appropriation or fund may be used are violated.

DoD Directive 7200.1, “Administrative Control of Appropriations,” May 4, 1995, regulates fund control for all DoD Components. The directive requires DoD components to establish positive control and maintain adequate systems of accounting for appropriations and other available funds. The directive further requires the Heads of the DoD Components to investigate and report on apparent and potential Antideficiency Act violations.

The Assistant Secretaries (Financial Management and Comptroller) of the Army and Air Force should investigate the contracts listed in Table 6 under their cognizance, for potential Antideficiency Act violations arising from using appropriated funds and working capital funds to purchase items that are not in compliance with the Berry Amendment and fix responsibility. If any violations of the Antideficiency Act occurred, the Assistant Secretaries should comply with reporting requirements in DoD Directive 7200.1 and Financial Management Regulation volume 14. Table 7 shows the number and value of the contracts with potential Antideficiency Act violations by Military Service on the current and prior audits.

Table 7. Contracts With Potential Antideficiency Act Violations

	<u>Number of Contracts*</u>	<u>Value**</u>
Army		
Current Audit	1	\$ 84,136
Prior Audit	2	845,236
Air Force		
Current Audit	2	178,587
Prior Audit	2	<u>253,940</u>
Total		
Current Audit	3	\$ 262,723
Prior Audit	4	\$1,099,176

*Does not include the 25 contract actions on the current audit and 39 actions on the prior audit that the Office of General Counsel, DoD, declined to treat as potential violations of the Antideficiency Act.

**Depicts funds obligated for items made in nonqualifying foreign countries, not necessarily total contract value

Office of General Counsel, DoD, Position on the Applicability of the Antideficiency Act to Violations of the Buy American Act. On January 18, 2002, the Office of General Counsel, DoD, opined that a violation of the Buy American Act may give rise to a potential violation of the Antideficiency Act. The Office of General Counsel further opined that the Buy American Act applied to procurements of commercial items, but that DFARS 215.503.(a)(xi) created sufficient ambiguity so as to make a contrary conclusion reasonable. Therefore, the Office of General Counsel made its opinion effective prospectively only and declined to treat any past violations of the Buy American Act (includes the 25 Buy American Act violations discussed in this report) as potential violations of the Antideficiency Act.

The Department of Defense Appropriation Acts for FY 1998 and 1999 are applicable to the contracts that did not comply with the Buy American Act. The laws state in part:

None of the funds appropriated in this Act may be expended by an entity of the Department of Defense unless the entity, in expending the funds, complies with the Buy American Act. . . .

In a 1992 decision, the Comptroller General held that a procurement of fuel cells in violation of Berry Amendment restrictions would result in a violation of the Antideficiency Act prohibition against obligating agency funds in direct contravention of a specific limitation contained in an appropriations act (Comptroller General Decision, B-246304.2, "Matter of: Department of Defense Purchase of Fuel Cells," July 31, 1992). As noted, the Appropriations Act

language considered by the Comptroller General in 1992 has since expanded and become a permanent prohibition. Because the Defense Appropriations Acts now contain similar language with respect to purchases in violation of the Buy American Act, we believe that the same rationale and result should apply in those cases. To avoid potential violations of the Antideficiency Act on future procurements of military clothing items, contracting officers must follow FAR and DFARS guidance to properly implement the Buy American Act and the provision of law known as the “Berry Amendment” codified at 10 U.S.C. 2533a.

Actions Taken After the Audit of FY 1996 and FY 1997 Procurements of Military Clothing and Related Items

After the prior audit of FY 1996 and FY 1997 procurements of military clothing and related items, several actions were taken to improve compliance with the Buy American Act and the Berry Amendment but additional actions are needed to improve compliance.

Recommendations in the Prior Audit Report. Report No. 99-023 contained the following recommendations:

- The Director, Defense Procurement, should issue guidance to emphasize the requirement to incorporate and enforce the Buy American Act and Berry Amendment provisions and clauses in solicitations and contracts for military clothing and related items.
- The Director, Acquisition Initiatives should ensure that the Defense Acquisition University stresses the ramifications of not complying with the Buy American Act and the Berry Amendment in their existing contracting courses.
- The Assistant Secretaries (Financial Management and Comptroller) of the Army, Navy, and Air Force should investigate, for the contracts under their cognizance, the 43 potential Antideficiency Act violations.

Actions Taken on the Prior Audit Recommendations. On March 2, 1999, the Director, Defense Procurement, issued policy guidance that identified the specific DFARS subparts that implement the requirements of the Buy American Act and the Berry Amendment and required that contracting officers review and comply with the requirements. We found little evidence that the Director, Defense Procurement, memorandum was disseminated to or implemented at the installation level by the Military Departments. On May 23, 2000, the Defense Acquisition University incorporated expanded coverage of the Buy American Act in the basics of contracting course, the fundamentals of contract pricing course, and the Government contract law course. See Appendix E for a summary of the additional actions taken at specific installations. The actions taken after the prior audit would have affected only contracts awarded in FY 1999. We saw no significant reductions in violations of Buy American Act and Berry Amendment procedures for those contracting actions. Further, four military installations (Letterkenny Army

Depot, the Military Academy, FISC Bremerton, and the Air Force Academy) that had violations identified in the prior audit also had violations identified in this audit.

The Army, Navy, and Air Force investigated the contracts under their cognizance for potential Antideficiency Act violations. None of the investigations concluded that there was an Antideficiency Act violation. The Army stated that, although violations of the Berry Amendment and the Buy American Act may have occurred, such violations do not give rise to a violation of the Antideficiency Act. The Army did not provide the rationale for its position. The Navy stated that even though the contracts did not comply with the Buy American Act, they did not violate the appropriation act restrictions on the availability of funds absent compliance with the Buy American Act. The Navy concluded that the Buy American Act is a domestic content restriction, and that DFARS 212.503(a)(xi), “Applicability of Certain Laws to Executive Agency Contracts for the Acquisition of Commercial Items,” makes domestic content restrictions of the appropriation acts inapplicable to procurements of commercial items. The Air Force used rationale similar to that used by the Navy to conclude that no Antideficiency Act violations occurred.

General Counsel, DoD, Position on the Applicability of the Antideficiency Act to Violations of the Buy American Act and Berry Amendment. We disagreed with the conclusions reached by the Military Departments in their investigations of the potential Antideficiency Act violations. During the October 12, 1999, mediation meeting with the Navy, we determined that the DoD Deputy General Counsel (Acquisition and Logistics) was considering the effect of DFARS 212.503(a)(xi) on DoD procurements. Because no General Counsel position had yet been issued, we formally recommended that the General Counsel establish a DoD position regarding the applicability of the Antideficiency Act to violations of the Buy American Act in our December 2000 report on the free weight acquisitions. On January 18, 2002, the Office of General Counsel, DoD, opined that a violation of the Buy American Act may give rise to a potential violation of the Antideficiency Act. The Office of General Counsel further opined that the Buy American Act applied to commercial item procurements. However, DFARS 215.503(a)(xi) created sufficient ambiguity to make a contrary conclusion reasonable, albeit incorrect. Accordingly, the Office of General Counsel made its opinion prospective and declined to treat past violations of the Buy American Act as Antideficiency Act violations. The General Counsel was not asked to comment on the effect of Berry Amendment violations and did not do so. However, the DFARS provision upon which the dispute was predicated purported to exempt commercial purchases from domestic content restrictions contained in Appropriation language in 1996 and later. Because the Berry Amendment was essentially made permanent prior to that date, the DFARS provision was not applicable.

Additional Proactive Action Needed. To improve compliance with the Buy American Act and Berry Amendment and reduce the risk of potential Antideficiency Act violations, we believe the Acquisition Executives for the Army, Navy, Air Force, and USSOCOM should establish clearance review procedures or additional training concerning solicitations and contract awards for clothing items to ensure Buy American Act and Berry Amendment provisions and clauses are included in solicitations and contracts, and that contractors comply with the provisions and

clauses. As stated previously, legal and technical reviews were either not performed or were not adequate to ensure compliance with the Buy American Act and the Berry Amendment.

Management Comments on the Report and Audit Response

The USSOCOM commented extensively on the report. See Appendix F for a summary of the USSOCOM comments and the audit response.

Recommendations, Management Comments, and Audit Response

Revised and Redirected Recommendations. As a result of management comments, we revised Recommendation 1. to include additional training as an alternative to establishing special procedures for clothing procurements. As a result of a January 18, 2002, Office of General Counsel, DoD, decision to not treat any past violations of the Buy American Act as potential violations of the Antideficiency Act, we revised Recommendation 2. to remove potential Antideficiency Act violations arising from purchases that did not comply with the Buy American Act. We also deleted the Navy as an addressee because the recommendation no longer applies to the Navy.

- 1. We recommend that the Acquisition Executives for the Army, Navy, Air Force, and U.S. Special Operations Command establish special procedures or additional training concerning solicitations and contract awards for clothing procurements subject to the Buy American Act and the Berry Amendment.**

Army Comments. The Army stated that current procedures coupled with a stern field reminder should preclude, or at least lessen, violations in future Army Acquisitions of military clothing. On February 14, 2002, the Army Acquisition Executive issued a memorandum reminding the Army Principal Assistants responsible for contracting of the Buy American Act and Berry Amendment restrictions and enjoining them to comply on future acquisitions.

Navy Comments. The Navy nonconcurred. The Navy stated that sufficient contracting officer and legal review procedures already exist for the procurements. The Navy recognized that some contracting officers may not be sufficiently familiar with the Buy American Act guidance and stated that those Navy activities involved will conduct refresher training on Buy American Act responsibilities. The Navy included, as a special interest item, a review of procurements involving Buy American Act and Berry Amendment restrictions in its triennial procurement performance management assessments of field activities, and will conduct on-site training if deficiencies are identified. Additionally, in May 2001, the Navy issued a memorandum requesting contracting activities to reemphasize to contracting and acquisition personnel the importance and significance of the Buy American Act and the Berry Amendment (See Appendix G). The Navy also changed its acquisition

procedures supplement to restrict authority to make determinations concerning the Berry Amendment to the Secretary of the Navy and rescinded all existing delegations of that authority.

Air Force Comments. The Air Force concurred. The Air Force stated that major commands have either developed, or are in the process of developing, training and tools to help ensure compliance with the Buy American Act and the Berry Amendment. The Air Force is also developing a comprehensive training module on the laws and will deploy the training across the Air Force by July 12, 2002. The training will cover the Buy American Act and the Berry Amendment history, usage, exceptions, and penalties for noncompliance. Additionally, the Air Force will review Buy American Act and Berry Amendment procedures in the DFARS and the Air Force FAR Supplement to ensure that they contain clear and concise guidance for contracting officers.

USSOCOM Comments. The USSOCOM did not comment specifically on the recommendation. However, in its comments on the Finding, USSOCOM stated that it agreed that application of the Buy American Act and the Berry Amendment is difficult and deserves additional attention. Application of the laws has always been a difficult area of the FAR and DFARS to implement. USSOCOM stated that it will present training on the proper handling of Buy American Act and Berry Amendment issues.

Audit Response. Management comments are responsive. The actions taken and planned by management satisfy the intent of the recommendation.

2. We recommend that the Assistant Secretaries (Financial Management and Comptroller) of the Army and the Air Force initiate, for the contracts under their cognizance listed in Table 6 of this report, investigations of the potential Antideficiency Act violations arising from the use of appropriated funds to purchase items that do not comply with the Berry Amendment, fix responsibility, and if any violations of the Antideficiency Act occurred, comply with reporting requirements in DoD Directive 7200.1 and the DoD Financial Management Regulation. The Assistant Secretaries should also provide a copy of the preliminary review reports and the final formal investigation reports to the Inspector General, DoD.

Army Comments. The Army nonconcurred, stating there is no reason to conclude that Letterkenny Army Depot committed a potential Antideficiency Act violation when it purchased safety shoes that did not comply with the Berry Amendment because no individual delivery order or the total value of all the delivery orders exceeded \$100,000. Concerning potential Antideficiency Act violations that resulted from violations of the Buy American Act, the Army stated that if the General Counsel, DoD, determines that a potential Antideficiency violation occurs because of a violation of the Buy American Act, the Army will initiate investigations to determine whether an Antideficiency Act violation occurred.

Navy Comments. The Navy concurred with the draft report recommendation that potential Antideficiency Act violations that resulted from violations of the Buy

American Act be investigated. The Navy stated that the Commander, Naval Supply Systems Command, has been requested to complete a preliminary review into possible Antideficiency Act violations identified in the report.

Air Force Comments. The Air Force concurred, stating that it has begun preliminary review of the items that may not comply with the Berry Amendment or the Buy American Act. The Air Force stated that it has initially found that there is not reason to conclude that the Air Force Academy committed an Antideficiency Act violation when they purchased athletic shoes that did not comply with the Berry Amendment because no delivery order exceeded \$100,000. The Air Force further stated that purchases of foreign made items under the Buy American Act may not have violated the Antideficiency Act, and have been elevated to the Office of the General Counsel, DoD, for a decision.

Audit Response. The Army and Air Force comments on the investigation of potential Antideficiency Act violations are not responsive. We disagree with Army and Air Force position that there is no reason to conclude that potential Antideficiency Act violations occurred when they purchased shoes that did not comply with the Berry amendment because the delivery orders did not exceed \$100,000 (the simplified acquisition threshold). The orders were issued under indefinite-delivery, indefinite-quantity (IDIQ) contracts with estimated values in excess of \$100,000. The Army contract had an estimated value of \$775,131 (including an estimated \$346,460 for shoes manufactured in nonqualifying countries). Air Force contracts F05611-99-D-M502 and F05611-98-D-M001 had estimated values of \$404,273 and \$139,382, respectively, for shoes manufactured in nonqualifying countries. Unless an exception applies, DFARS 225.7002-3 requires that the Berry Amendment clause (252.225-7012) be included in all solicitations and contracts that exceed the simplified acquisition threshold. No exceptions apply to the procurements in question. Additionally, FAR 16.506(a), "Solicitation Provisions and Contract Clauses," requires that FAR 52.216-18, "Ordering," be included in IDIQ contracts. FAR 52.216-18 states that all delivery orders are subject to the terms and conditions of the IDIQ contract. That is, if the estimated value of an IDIQ contract exceeds the simplified acquisition threshold, the contract and all delivery orders issued under the contract must comply with the laws and regulations that apply to procurements that exceed the simplified acquisition threshold. Delivery orders under an IDIQ contract cannot be used to circumvent procurement laws and regulations. We ask that the Army and Air Force reconsider their position on the recommendation and respond to the final report.

The Office of General Counsel, DoD, declined to treat any past violations of the Buy American Act as potential violations of the Antideficiency Act. Therefore, the Army, Navy, and Air Force are not required to investigate the 25 violations of the Buy American Act shown in Table 4 of the report as potential Antideficiency Act violations.

Appendix A. Audit Process

Scope

The audit examined purchases of military clothing and related items in excess of the micro-purchase threshold (\$2,500) by military installations during FYs 1998 and 1999 for compliance with the Buy American Act and Berry Amendment. We also evaluated DoD actions taken after the issuance of Inspector General, DoD, Report No. 99-023 on October 29, 1998.

General Accounting Office High-Risk Area. The General Accounting Office has identified several high-risk areas in the Department of Defense. This report provides coverage of the Contract Management high-risk area.

Methodology

We used the Buy American Act, the Berry Amendment, and the FAR and DFARS implementing guidance as criteria for determining whether contracting officers complied with the Buy American Act and the Berry Amendment when they procured military clothing and related items. We analyzed the contracts for 698 of FYs 1998 and 1999 procurements of military clothing and related items. We interviewed contractors and reviewed contractor catalogs and other documents to determine the place of manufacture of the items procured. We discussed with contracting officers the process for procuring military clothing and related items and for ensuring compliance with the Buy American Act and the Berry Amendment. On contracts with items manufactured in a foreign country, we visited the responsible military installations, discussed the procurements with contracting and supply officials, and reviewed additional procurement documentation, such as Buy American Act certificates; findings and determinations; and price adjustment calculations, to determine whether the procurements were in compliance with the Buy American Act or the Berry Amendment as applicable.

Use of Computer-Processed Data. We relied on computer-processed data from the DCADS database to identify contract actions more than \$25,000. We assessed the reliability of the data in the system concerning the identification of contract numbers, award dates, and dollar amounts of the transactions. We determined that the contract numbers and dollar amounts in the database generally agreed with the contract documents. We did not find errors that would preclude use of the computer-processed data to meet the audit objectives or that would change the conclusions in the report.

Universe. The DCADS shows that 144 installations executed 3,203 contract actions valued at more than \$25,000 for items in Federal supply classification (FSC) codes 8415, 8430, 8435, and 8465 during FYs 1998 and 1999. The Air Force Academy identified three additional contract actions over \$25,000 that, for undetermined reasons, were not in the DCADS universe. The total value of the 3,206 contract actions was about \$1.15 billion. Additionally, 41 of the

144 installations with contract actions valued at more than \$25,000 identified 658 contract actions for military clothing and related items valued between \$2,500 and \$25,000. Three military installations that had violations of the Buy American Act identified in the prior audit, but did not have any procurements valued more than \$25,000 in FYs 1998 and 1999, identified 11 FYs 1998 and 1999 contract actions valued between \$2,500 and \$25,000. The total value of the 669 contract actions valued between \$2,500 and \$25,000 was about \$5.5 million. The FSC codes cover the following types of military clothing and related items:

- FSC 8415-Special purpose clothing: special purpose headwear, including helmets, except ballistic protective; safety and protective clothing; athletic clothing; safety, combat, protective, and work gloves; submarine deck exposure clothing; flight clothing components designed for use with both specialized and conventional ensembles.
- FSC 8430-Men's footwear: rubber footwear, athletic footwear, safety footwear, submarine deck exposure footwear.
- FSC 8435-Women's footwear: rubber footwear, athletic footwear, safety footwear.
- FSC 8465-Individual equipment: musette bags, duffel bags, ammunition belts, pistol belts, handcuffs, packboards, sleeping bags, knapsacks, hiker's packs, sunglasses, skis, snowshoes, swords with scabbards.

Sample. To develop the audit sample, we excluded the following from the universe of contract actions greater than \$25,000: the 2,654 actions that were awarded by the Defense Logistics Agency, the 88 actions awarded by military installations with two or fewer actions for FSC 8415 and FSC 8465, and the 43 actions that were awarded by overseas military installations. We selected 421 contract actions awarded by 62 military installations that awarded three or more contract actions for military clothing or related items, unless the military installation awarded an action for FSC 8430 or FSC 8435. We selected all contracting actions for footwear for review because the prior audit determined that 14 of the 16 contracting actions that did not comply with the Buy American Act or the Berry Amendment were purchases of footwear. For contract actions less than \$25,000, we judgmentally sampled the actions identified by the 62 military installations that awarded contract actions more than \$25,000, and by 3 military installations that had Buy American Act violations on the prior audit. The following is a list of military installations and the number and dollar range of the contract actions reviewed:

Contract Actions Reviewed

<u>Military Installation</u>	\$2,500 to <u>\$25,000</u>	\$25,000 to <u>\$100,000</u>	More than <u>\$100,000</u>	Total
Army				
Anniston Army Depot, AL ^{1/ 4/}	9	2	0	11
Army Engineer District, Philadelphia, PA ^{1/ 4/}	2	5	0	7
Army Material Command Acquisition Center, Aberdeen Proving Ground, MD ^{1/ 2/}	5	8	4	17
Army Material Command Acquisition Center, Natick, MA ^{1/ 4/}	5	15	23	43
Army Soldiers Systems Command, MA ^{1/ 2/}	5	7	25	37
Fort Benning, GA ^{1/ 4/}	4	2	1	7
Fort Carson, CO ^{1/ 2/}	0	4	1	5
Fort Drum, NY ^{1/ 4/}	0	4	0	4
Fort Hood, TX ^{1/ 4/}	0	3	1	4
Fort Knox, KY ^{1/ 2/}	4	3	0	7
Fort Lewis, WA ^{1/ 3/}	0	4	2	6
Fort Polk, LA ^{1/ 2/}	0	2	4	6
Letterkenny Army Depot, PA ^{1/ 2/}	0	0	4	4
Military Academy, NY ^{1/ 2/}	5	8	2	15
Tobyyhanna Army Depot, PA ^{1/ 4/}	5	1	0	6
USPFO for Alabama ^{1/ 4/}	1	1	0	2
USPFO for Iowa ^{1/ 4/}	0	3	0	3
USPFO for Kansas ^{1/ 4/}	5	1	0	6
USPFO for Kentucky ^{1/ 4/}	0	2	0	2
USPFO for Massachusetts ^{1/ 4/}	2	1	0	3
USPFO for Montana ^{1/ 4/}	5	1	0	6
USPFO for Nevada ^{1/ 4/}	1	1	0	2
USPFO for New Mexico ^{1/ 4/}	0	1	0	1
USPFO for North Carolina ^{1/ 4/}	0	6	1	7
Sub-Total	58	85	68	211
Navy				
FISC, Bremerton, WA ^{1/ 2/}	9	18	32	59
FISC, Norfolk, VA ^{1/ 2/}	5	11	2	18
FISC, Pearl Harbor, HI ^{1/ 3/}	5	1	2	8
FISC, Philadelphia, PA ^{1/ 3/}	0	0	2	2
FISC, San Diego, CA ^{1/ 3/}	12	9	0	21
FISC, Washington, DC ^{1/ 4/}	0	2	1	3

USPFO: United States Property and Fiscal Office

FISC: Fleet and Industrial Supply Center

Footnotes:

^{1/}One or more contracts included incorrect or no Buy American Act or Berry Amendment clauses

^{2/}Similar problems found at the installation during the prior audit

^{3/}No problems found at the installation during the prior audit

^{4/}Not reviewed during the prior audit

Contract Actions Reviewed (cont'd)

<u>Military Installation</u>	\$2,500 to <u>\$25,000</u>	\$25,000 to <u>\$100,000</u>	More than <u>\$100,000</u>	Total
Navy				
NCBC, Gulfport, MS ^{1/4/}	1	3	0	4
NSWC, Panama City, FL ^{1/4/}	2	3	11	16
Sub-Total	34	47	50	131
Air Force				
Air Force Academy, CO ^{1/2/}	1	10	12	23
Beale Air Force Base, CA ^{1/4/}	0	3	0	3
Cannon Air Force Base, NM ^{1/4/}	5	1	0	6
Dover Air Force Base, DE ^{1/2/}	5	7	0	12
Edwards Air Force Base, CA ^{1/4/}	7	2	1	10
Eielson Air Force Base, AK ^{1/2/}	0	1	0	1
Elmendorf Air Force Base, AK ^{1/2/}	7	11	0	18
Fairchild Air Force Base, WA ^{1/2/}	20	5	0	25
General Mitchell International Airport- Air Reserve Station, Milwaukee, WI ^{1/4/}	4	0	1	5
Goodfellow Air Force Base, TX ^{1/2/}	25	4	0	29
Grand Forks Air Force Base, ND ^{1/2/}	52	8	0	60
Hickam Air Force Base, HI ^{1/4/}	1	4	0	5
Homestead Air Reserve Base, FL ^{1/2/}	5	0	0	5
Hurlburt Field, FL ^{1/2/}	2	8	1	11
Keesler Air Force Base, MS ^{1/2/}	2	2	0	4
Langley Air Force Base, VA ^{1/2/}	5	8	6	19
Luke Air Force Base, AZ ^{1/4/}	1	3	0	4
Malmstrom Air Force Base, MT ^{1/4/}	0	4	1	5
Maxwell Air Force Base, AL ^{1/2/}	3	6	7	16
McGuire Air Force Base, NJ ^{1/4/}	0	2	0	2
Minot Air Force Base, ND ^{1/2/}	0	4	0	4
Mississippi Air National Guard				
Meridian, MS ^{2/}	3	0	0	3
Mountain Home Air Force Base, ID ^{1/4/}	0	2	0	2
Nellis Air Force Base, NV ^{1/2/}	5	4	1	10
Peterson Air Force Base, CO ^{1/3/}	4	2	2	8
Pittsburgh Air Reserve Station, PA ^{1/2/}	3	0	0	3

NCBC: Naval Construction Battalion Center

NSWC: Naval Surface Warfare Center

Footnotes:

^{1/}One or more contracts included incorrect or no Buy American Act or Berry Amendment clauses

^{2/}Similar problems found at the installation during the prior audit

^{3/}No problems found at the installation during the prior audit

^{4/}Not reviewed during the prior audit

Contract Actions Reviewed (cont'd)				
<u>Military Installations</u>	\$2,500 to <u>\$25,000</u>	\$25,000 to <u>\$100,000</u>	More than <u>\$100,000</u>	Total
<u>Air Force</u>				
Shaw Air Force Base, SC ^{1/4/}	0	1	0	1
Tinker Air Force Base, OK ^{1/2/}	3	4	0	7
Wright Patterson Air Force Base, OH ^{1/2/}	<u>2</u>	<u>9</u>	<u>1</u>	<u>12</u>
Sub-Total	165	115	33	313
<u>Marine Corps</u>				
Marine Corps Systems Command, Quantico, VA ^{1/3/}	0	1	8	9
<u>Unified Command</u>				
U.S. Special Operations Command, MacDill Air Force Base, FL ^{1/4/}	0	0	6	6
Naval Special Warfare Development Group Virginia Beach, VA ^{1/4/}	12	12	1	25
Naval Special Warfare Group 1, CA ^{1/4/}	<u>0</u>	<u>3</u>	<u>0</u>	<u>3</u>
Sub-Total	12	15	7	34
Total	269	263	166	698

Footnotes:

^{1/}One or more contracts included incorrect or no Buy American Act or Berry Amendment clauses

^{2/}Similar problems found at the installation during the prior audit

^{3/}No problems found at the installation during the prior audit

^{4/}Not reviewed during the prior audit

Audit Type, Dates, and Standards. We performed this program audit from December 2000 through August 2001 in accordance with generally accepted government auditing standards.

Contacts During the Audit. We visited or contacted individuals and organizations within the DoD, the General Services Administration, and private companies. Further details are available upon request.

Management Control Program Review

DoD Directive 5010.38, "Management Control (MC) Program," August 26, 1996, and DoD Instruction 5010.40, "Management Control (MC) Program Procedures," August 28, 1996, require DoD organizations to implement a comprehensive system of management controls that provides reasonable assurance that programs are operating as intended and to evaluate the adequacy of the controls.

Scope of Review of Management Control Program. We reviewed the adequacy of the management controls over procurement of military clothing and related items at DoD contracting offices visited. Specifically, we examined management controls

over compliance with the Buy American Act and the Berry Amendment when procuring military clothing and related items. We also reviewed the adequacy of management's self-evaluation of management controls.

Adequacy of Management Controls. We identified material management control weaknesses as defined by DoD Instruction 5010.40. The Army, Navy, and Air Force had not implemented adequate management controls over contracting actions to ensure compliance with the Buy American Act and the Berry Amendment. The audit identified purchases of clothing items that do not comply with the Buy American Act and the Berry Amendment. The noncompliance occurred because management controls did not always ensure appropriate clauses were included in the solicitations and contracts, and when the clauses were included, the controls did not ensure the clauses were enforced. In some instances, the items were purchased even though the contractors identified the items as foreign made in their catalogs or through the Buy American certification process. Recommendations 1. and 2. in this report, if implemented, will assist in correcting the weaknesses. A copy of the report will be provided to the senior official responsible for management controls in the Army, the Navy, and the Air Force.

Adequacy of Management's Self-Evaluation. Management's self-evaluation was not adequate. The Army, the Navy, and the Air Force organizations included in the audit did not identify compliance with the Buy American Act and Berry Amendment as topics for self-assessment and, therefore, did not identify or report the material management control weaknesses identified by the audit.

Prior Coverage

General Accounting Office

GAO Report No. GAO-01-695T, Testimony Before the Committee on Small Business, House of Representatives, "Contract Management: Purchase of Army Black Berets," May 2, 2001

Inspector General, DoD

Report No. D-2001-028, "Compliance with Procurement Laws in Purchasing Free Weights and Other Strength Building Equipment," December 27, 2000

Report No. D-2000-102, "Military Working Dog Procurements," March 14, 2000

Report No. 99-023, "Procurement of Military Clothing and Related Items by Military Organizations," October 29, 1998

Appendix B. FAR and DFARS Guidance Revised After Contracts Reviewed Were Awarded and Discussion of the Guidance

The FAR and DFARS guidance that was in effect when the contracts were awarded is cited in this report. The current guidance makes no substantive change to FAR or DFARS policy pertaining to foreign acquisition.

<u>Previous Guidance</u>	<u>Current Guidance</u>	<u>Effective Dates, Number</u>
FAR 4.805(b)(10)	FAR 4.805(b)(5)(ii)	August 7, 2000 (FAC 97-18)
FAR 25.108	FAR 25.104	February 25, 2000 (FAC 97-15)
FAR 52.225-3	FAR 52.225-1	February 25, 2000 (FAC 97-15)
FAR 52.225-9	FAR 52.225-5	February 25, 2000 (FAC 97-15)
DFARS 225.102	DFARS 225.103	April 13, 2000 (DCN 20000413)
DFARS 225.102(b)(i)	DFARS 225.103(b)(i)	April 13, 2000 (DCN 20000413)
DFARS 225.105	DFARS 225.502(2)	April 13, 2000 (DCN 20000413)
DFARS 225.109(a)	DFARS 225.1101(1)	April 13, 2000 (DCN 20000413)
DFARS 225.109(b)	DFARS 225.171(a)	April 13, 2000 (DCN 20000413)
DFARS 225.109(d)	DFARS 225.1101(2)	April 13, 2000 (DCN 20000413)
DFARS 225.403-70	DFARS 225.401-70	April 13, 2000 (DCN 20000413)
DFARS 212.503(a)(xi)	DFARS 212.503(a)(xi)	December 13, 2000 (DCN 20001213)

DCN: DFARS Change Notice

FAC: Federal Acquisition Circular

Discussion of the Guidance

The Buy American Act. The Buy American Act states in part:

Notwithstanding any other provision of law, and unless the head of the Federal Agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. . . . (10 U.S.C. 10a)

Buy American Act Implementing Guidance. The following DFARS provisions and clauses implement the Buy American Act in DoD.

- DFARS 225.102 “Buy American Act-Supplies, Policy,” requires contracting officers to obtain a determination that the item is not reasonably available when no domestic offer is received or domestic offers are insufficient to meet the requirement and the award is made based on a nonqualifying country end product.
- DFARS 225.105 “Evaluating Offers,” stipulates that contracting officers will evaluate offers by adding a 50 percent factor to the price of each nonqualifying country offer, if domestic offers are received.
- DFARS 252.225-7000, “Buy American Act - Balance of Payments Program Certificate,” must be included in solicitations for contracts where supplies are required, unless the solicitation includes either the DFARS Trade Agreements Act clause or the DFARS North American Free Trade Agreement clause. The Trade Agreements Act and the North American Free Trade Agreement do not apply to military clothing and related items (DFARS 225.403-70). DFARS 252.225-7000 requires offerors to certify each end product, as domestic, qualifying country, or nonqualifying country.
- DFARS 252.225-7001, “Buy American Act and Balance of Payments Program,” must be included in solicitations and contracts where supplies are required. This clause implements the Buy American Act in a manner that provides a preference to domestic end products over other end products, except for end products that are qualifying country end products. A domestic end product is defined as an unmanufactured end product mined or produced in the United States, an end product manufactured in the United States, or an end product manufactured in the United States if the costs of its qualifying country components and its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

The Berry Amendment. Beginning in FY 1993, the Berry Amendment (10 U.S.C. 2241 note) was effectively made permanent when Public Law 102-396, “Department of Defense Appropriation Act, 1993,” section 9005 included the language “during the current fiscal year and hereafter . . .” In FY 1994, the Berry Amendment was expanded to prohibit the use of appropriated funds or “any other funds available to the Department of Defense” by Public Law 103-139, “Department of Defense Appropriations Act, 1994,” section 8005. Section 4401(e) of Public Law 103-355, “Federal Acquisition Streamlining Act of 1994,” subsequently modified the Berry Amendment to incorporate the simplified acquisition threshold (currently \$100,000). Prior versions of the Berry Amendment referred to the small purchase threshold. Section 832 of Public Law 107-107, “National Defense Authorization Act for Fiscal Year 2002,” repealed the Berry Amendment, modified its provisions, and codified the modified provisions at 10 U.S.C. 2533a. The new statute, as did the Berry Amendment, requires that appropriated funds or any other funds available to DoD not be used for the procurement of food, clothing, and other specified items in amounts greater than the

simplified acquisition threshold unless the items are grown, reprocessed, reused, or produced in the United States or its possessions. We cite the Berry Amendment throughout this report because the Berry Amendment was in effect when the contract actions discussed in the report were awarded.

Berry Amendment Implementing Guidance. DoD has included several exceptions to the Berry Amendment restrictions in DFARS 225.7002-2. The following two exceptions apply to military clothing and related items.

- Swords and scabbards may be purchased from foreign sources because they are not manufactured in the United States or its possessions in sufficient and reasonably available commercial quantities of a satisfactory quality.
- Chemical warfare protective clothing may be purchased from a qualifying country when the purchase furthers an existing agreement.

Procurements of other military clothing and related items must comply with the Berry Amendment restrictions unless the Secretary of the Military Department concerned, or designee, determines that items produced in the United States or its possessions cannot be acquired in satisfactory quality and quantity at United States market prices. Unless an exception applies, contracting officers must include the clause at DFARS 252.225-7012 in all solicitations and contracts that exceed the simplified acquisition threshold (DFARS 225.7002-3(a), “Contract Clauses”). The clause specifies that the contractor agrees to deliver items that have been grown, reprocessed, reused, or produced in the United States, its possessions, or Puerto Rico.

Applying the Buy American Act and the Berry Amendment. In general, the FAR requires that only domestic products be acquired for public use in the United States on procurements that exceed the \$2,500 micropurchase ceiling. The DoD has determined that it is inconsistent with the public interest to apply the restrictions of the Buy American Act and Balance of Payments Program to acquisitions for public use of certain supplies that are mined, produced, or manufactured in the 17 foreign countries where memoranda of understanding or other international agreements exist. Individual acquisitions for products of four additional qualifying countries may, on a purchase-by-purchase basis, be exempted from application of the Buy American Act and Balance of Payments Program as inconsistent with the public interest. The 21 countries are identified as “qualifying countries” in DFARS 225.872, “Contracting with Qualifying Country Sources.” To comply with the Buy American Act, contracting officers must add 50 percent to the price of nonqualifying country end-products when evaluating offers with domestic end-products and offers with nonqualifying country end-products. A nonqualifying country is a country other than the United States or one of the 21 qualifying countries listed in DFARS 225.872 (see Appendix C).

Appendix C. Qualifying Countries Listed in DFARS 225.872

The Buy American Act and the Balance of Payments Program does not apply to the acquisition of defense equipment which is mined, produced, or manufactured in any of the qualifying countries listed below.

Qualifying Countries

Australia	Belgium
Canada	Denmark
Egypt	Federal Republic of Germany
France	Greece
Israel	Italy
Luxembourg	Netherlands
Norway	Portugal
Spain	Switzerland
Turkey	United Kingdom of Britain and Northern Ireland

The acquisition of products manufactured in the following qualifying countries may be exempted from the Buy American Act and the Balance of Payments Program on a purchase-by-purchase basis.

Qualifying Countries

Austria
Finland
Sweden

Appendix D. Procurements that Did Not Comply with the Buy American Act or the Berry Amendment

Army Organizations

Fort Knox

Contract: DABT23-98-P-1238 and DABT23-99-P-0766

Awarded: September 24, 1998, and September 23, 1999

Type of Contract: Purchase Orders

Contract Value: \$49,207 and \$36,653 (includes \$15,785 and \$26,778 respectively for T-shirts manufactured in nonqualifying countries)

Items Purchased: T-Shirts with Silk-Screened Logo

Procurement Method: Competitive, Non-competitive

Contractor: United States Disciplinary Barracks, Fort Leavenworth, KS

Details: The Fort Knox contracting officer awarded the purchase orders to the United States Disciplinary Barracks (USDB), a nonappropriated fund activity. Complete details on purchase order DABT23-98-P-1238 were not available because the purchase order file was destroyed 1 year after final payment as permitted by FAR 4.805(b)(10). Available documents indicate that DABT23-98-P-1238 was competitively awarded, and that DABT23-99-P-0766 was noncompetitively awarded. The contracting officer incorrectly included FAR 52.225-3, "Buy American Act-Supplies," in purchase order DABT23-98-P-1238. We could not determine the clauses incorporated in DABT23-99-P-0766. A Buy American Act/Balance of Payment Program certificate, required by both the FAR and the DFARS, in which prospective contractors certify that, except as indicated, the products offered are domestic end products was not available for the purchase orders. Both purchase orders included T-shirts manufactured in nonqualifying countries (mostly Mexico, El Salvador, Honduras, and Guatemala) imprinted with the Reserve Officer Training Corps logo. The USDB contracting officer did not include any Buy American Act clauses in purchase order NAFTL1-99-M-0061 for the T-shirts purchased under purchase order DABT23-98-P-1238, but did include a Buy American Act, Trade Agreements Act, and Balance of Payments Program clause in purchase order NAFTL1-00-M-0103 for the T-shirts furnished under DABT23-99-P-0766. However, the Trade Agreements Act does not apply to clothing, and the T-shirts do not qualify as domestic or qualifying country end products under the Buy American Act. To qualify as a domestic end product or a qualifying country end product, an item must be manufactured in the United States or in a qualifying country of United States components or qualifying country components that exceed 50 percent of the cost of all the components. Contracting officials at Fort Knox did not know that the T-shirts supplied by USDB were not domestic end products and stated that, because they were purchasing the T-shirts from another DoD installation, they believed that laws such as the Buy American Act were complied with and that they did not try to determine where the T-shirts

were manufactured. The USDB purchase of T-shirts that were not in compliance with the Buy American Act resulted in Fort Knox purchasing from USDB items that were not in compliance with the Buy American Act. The USDB contracting officer stated that he wanted to satisfy the customer and that he was not aware that the T-shirts were manufactured in nonqualifying countries. In phone conversations, a Fort Knox official informed the USDB screen print supervisor of the brand name T-shirts that would match the color of T-shirts on-hand at Fort Knox. The screen-print supervisor provided the contracting officer with the suggested sources for the specified T-shirts, and the contracting officer awarded the purchase orders without questioning where the T-shirts were manufactured.

Contract: DABT23-99-M-0390

Awarded: September 23, 1999

Type of Contract: Purchase Order

Contract Values: \$8,956 (includes \$4,666 for polo shirts manufactured in nonqualifying countries)

Items Purchased: Polo Shirts

Procurement Method: Competitive

Contractor: AD Works Specialty Advertising, Jeffersonville, IN

Details: The contracting officer issued the purchase order for polo shirts with an embroidered patch and writing. The contracting officer incorrectly included FAR clause 52.225-3 in the purchase order. The contracting officer should have included DFARS 252.225-7001 as required by DFARS 225.109, "Evaluating Offers." A Buy American Act/Balance of Payment Program certificate, required by both the FAR and the DFARS, in which prospective contractors certify that, except as indicated, the products offered are domestic end products was not in the purchase order file. The contractor told us that the polo shirts were manufactured in Jamaica, Costa Rica, or Honduras. The polo shirts do not qualify as domestic or qualifying country end products. To be considered a domestic or qualifying country end product, the item must be manufactured in the United States or a qualifying country of United States components or qualifying country components that exceed 50 percent of the cost of all the components. The contracting officer stated that oral solicitations were used for the purchase order and that it is normal practice at Fort Knox to telephone three potential vendors for price quotations when oral solicitations are used. The purchase order file contained no evidence that the AD Works Specialty Advertising, or any other vendor that was orally solicited, was advised, as required by DFARS 225.109(b), that only domestic or qualifying country end products are acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. Additionally, the purchase order file does not contain the determination by a level above the contracting officer that the polo shirts are not reasonably available from domestic sources as required by DFARS 225.102 before awarding a purchase order for nonqualifying country end products.

Letterkenny Army Depot

Contract: DAAC67-97-D-0002

Awarded: July 28, 1997

Type of Contract: Indefinite-Delivery, Indefinite-Quantity

Contract Value: \$775,131 (includes \$343,460 for safety footwear manufactured in nonqualifying countries)

Items Purchased: Safety Shoes

Procurement Method: Competitive

Contractor: Iron Age Protective Company, Pittsburgh, PA

Details: The contracting officer included in the solicitation a requirement that the contractor provide safety footwear in various types and sizes through a mobile service to authorized employees of Letterkenny Army Depot. The contracting officer included the Berry Amendment clause, DFARS 252.225-7012, in the solicitation and contract. However, the contracting officer did not obtain the Secretary of the Army determination required by DFARS 225.7002-2 that shoes manufactured by the United States or its possessions were not available before awarding the contract to a contractor that supplied shoes manufactured in a nonqualifying foreign country. The Commander, Letterkenny Army Depot initiated a request for the determination but the request was not processed to completion because an informal Army investigation of a potential Antideficiency Act violation that resulted from FYs 1996 and 1997 procurements of safety shoes by Letterkenny Army Depot, concluded that shoes are not a clothing item and therefore not covered by the Berry Amendment. We do not agree that shoes are not a clothing item. The Defense Supply Center Philadelphia "Guiding Principles for Acquisition," and various Army documents state that shoes are considered an item of clothing. The contracting officer received two offers showing several styles of shoes, some manufactured in nonqualifying countries, and some manufactured in the United States. Contracting personnel compared the two offers, analyzing each line item using the evaluation procedures and the 50 percent cost factor prescribed in DFARS 225.105 for evaluating offers that included both domestic and nonqualifying country end products under the Buy American Act. The contracting officer awarded the contract to the low offeror. The total contract value was \$775,131 with an estimated \$346,460 for shoes manufactured in nonqualifying countries. During FYs 1998 and 1999, the contracting officer awarded 24 delivery orders under the contract that included shoes manufactured in foreign countries. Each of the 24 delivery orders was under the \$100,000 threshold of the Berry Amendment. However, the contracting officer should have applied the Berry Amendment to the contract and each delivery order because the contract exceeded the \$100,000 Berry Amendment threshold, and the delivery orders are subject to the terms and conditions of the basic contract (FAR 16.506). The total value of the foreign made shoes included in the 24 delivery orders was \$84,136.

Military Academy

Contracts: DAAG60-98-M-0815 and DAAG60-99-P-0245

Awarded: July 10, 1998, and May 12, 1999

Type of Contract: Purchase Orders

Contract Values: \$71,535 and \$77,520 (Includes \$5,795 and \$5,320 respectively for blouses manufactured in a nonqualifying country)

Items Purchased: Blouses, White

Procurement Method: Competitive

Contractor: Marlow White Uniform Company, Leavenworth, KS

Details: Both purchase orders were for blouses manufactured in China, a nonqualifying country, as well as other items manufactured in the United States. The contracting officer correctly included DFARS 252.225-7000 and 252.225-7001 in the solicitations for the purchase orders. However, the contractor did not complete the certificate contained in DFARS 252.225-7000 that requires the contractor to certify that the items provided are domestic end products, qualifying country end products, or nonqualifying country end products. The contracting officer stated that Marlow White had been providing the blouses to the Academy for several years and she was not aware that the blouses were made in China. The contracting officer did not obtain from a level above the contracting officer the determination required by DFARS 225.102(b)(i), that the blouses are not reasonably available from domestic sources before awarding the purchase orders to a contractor that supplied nonqualifying country blouses.

Tobyhanna Army Depot

Contract: DAAC71-96-A-0318/0007 and 0009

Awarded: December 4, 1997, and April 16, 1998

Type of Contract: Blanket Purchase Agreement (BPA)

Contract Values: \$3,546 and \$5,048

Items Purchases: Gloves

Procurement Method: Credit Card

Contractor: Quint's Incorporated, Scranton, PA

Details: The contracting officer placed both orders under blanket purchase agreement DAAC71-96-A-0318 with Quint's Incorporated. Complete details on the orders and the agreement were not available because the contract files were destroyed one year after final payment, as permitted by FAR 4.805(b)(10). The contracting officer provided a copy of the standard form containing notices, instructions, and special clauses that Tobyhanna Army Depot contracting officers normally incorporate into contracts. The form incorrectly includes FAR clause 52.225-3 instead of the applicable DFARS provision and clause. The contracting officer should have included DFARS 252.225-7000 in the solicitation, and DFARS 252.225-7001 in the BPA as required by DFARS 225.109. The President of Quint's Incorporated stated that the gloves were manufactured in Vietnam, Malaysia, Mexico, and Hong Kong. The contracting officer stated that he did not determine where the gloves were manufactured, although he believed the specific gloves were not made domestically. The contracting officer did not obtain the determination required by DFARS 225.102 that domestic gloves were not

reasonably available before making the award to Quint's Incorporated, a contractor that supplied nonqualifying country gloves.

Navy Organizations

Fleet and Industrial Supply Center (FISC) Bremerton

Contracts: N00406-99-M-2951 and N00406-99-M-2820

Awarded: November 12, 1998 (both)

Type of Contract: Purchase Order

Contract Values: \$4,092 and \$27,699

Items Purchased: Anti-Vibration Gloves

Procurement Method: Competitive

Contractors: Safety and Supply Company, Seattle, WA, and Sound Safety Products, Everett, WA

Details: The gloves supplied by Safety and Supply and Sound Safety Products were obtained from Chase Ergonomics, Incorporated, Albuquerque, New Mexico. A representative of Chase Ergonomics stated that the gloves were made in China. The sole-source justifications for the purchase orders state that gloves made with gelfom are the only gloves known to meet American National Standards Institute or International Standards Organization standards for anti-vibration gloves. Chase Ergonomics holds a United States patent for leather gloves with gelfom. The sole-source justifications further state that several glove manufacturers were contacted and none could certify that their gloves met American National Standards Institute or International Standards Organization standards for anti-vibration gloves. Contracting officials familiar with the purchase orders stated that oral solicitations were used and that it is normal practice at FISC Bremerton to telephone three potential vendors for price quotations and to check country of origin when oral solicitations are used. Purchase order files showed that price quotations were obtained from three vendors that supply the gloves obtained from Chase Ergonomics. There was no evidence in the purchase order files that the contractors were advised, as required by DFARS 225.109(b), that only domestic or qualifying country end products are acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. Additionally, the purchase order files did not contain the determination by a level above the contracting officer that domestic gloves are not reasonably available as required by DFARS 225.102 before awarding a purchase order for nonqualifying country end products.

Contract: N00406-98-D-5060-1004

Awarded: July 12, 1999

Type of Contract: Indefinite-Delivery, Indefinite-Quantity

Order Value: \$2,852

Items Purchased: Latex Rubber Gloves

Procurement Method: Competitive

Contractor: Obbco Safety and Supply, Chesapeake, VA

Details: The contracting officer incorrectly incorporated FAR and DFARS provisions and clauses that cover the North American Free Trade Agreement (NAFTA) in the solicitation and contract. As stated in DFARS 225.403-70, the Trade Agreements Act, and NAFTA do not apply to clothing and related items. The Buy American Act applies. The contracting officer should have included DFARS 225.225-7000 in the solicitation and DFARS 225.225-7001 in the contract. Twenty offers were received in response to the solicitation, all from contractors offering gloves from nonqualifying countries under the Buy American Act. Obbco Safety and Supply provided a Buy American Act-Trade Agreements Act-Balance of Payment Program certificate that indicated the gloves were manufactured in Mexico. Mexico is an eligible country under NAFTA, but is a nonqualifying country under the Buy American Act. A FISC Bremerton contracting official stated that, at the time of contract award, she did not know that NAFTA was not applicable to the procurement. Even though latex rubber is an excepted material under FAR 25.108, “Nonavailable Articles,” that can be acquired as an end product or component without regard to the restrictions of the Buy American Act, the latex rubber gloves do not meet the test of a domestic end product. DFARS 225.105(5) states that to qualify as a domestic end product the product must be manufactured in the United States. The contracting officer did not obtain the determination required by DFARS 225.102 that domestic gloves are not reasonably available before awarding the contract for nonqualifying country end products.

FISC-Pearl Harbor

Contract: N00604-99-M-A430

Awarded: December 14, 1998

Type of Contract: Purchase Order

Contract Value: \$2,781

Items Purchased: Fishing Jacket and Bib Overalls

Procurement Method: Competitive

Contractor: Helly Hanson Seward, Seward, AK

Details: The contracting officer solicited three vendors and received two offers. One offer was rejected because the offered items did not meet the waterproof specification. The contract was awarded to the remaining contractor, Helly Hanson Seward. The contracting officer correctly included DFARS 225.225-7001 in the contract. The contract file did not contain a Buy American Act certificate required by DFARS 225.225-7000, nor did it contain any evidence that the solicited contractors were advised that only domestic or qualifying country end products are acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. Additionally, the contract file contained no evidence that the contracting officer obtained country of origin information for the offered items. We obtained documentation from Helly Hanson Seward that shows that the items purchased were manufactured in China and Indonesia. The contracting officer did not obtain the determination required by DFARS 225.102 that the fishing jacket and bib overalls were not reasonably available from domestic sources before awarding the contract for end products from nonqualifying countries.

FISC-San Diego

Contract: N00244-99-D-0015/0002

Awarded: March 30, 1999

Type of Contract: Indefinite-Delivery, Indefinite-Quantity

Contract Value: \$35,651

Item Purchased: Wetsuits

Procurement Method: Noncompetitive

Contractor: Ocean Enterprises, San Diego, CA

Details: The contract was a delivery order against an indefinite-delivery, indefinite-quantity contract. Neither the basic contract nor the delivery order contained the required DFARS Buy American Act clause. The combined Commerce Business Daily synopsis and request for quotations for the basic contract stated that DFARS 252.225-7001 was applicable. DFARS 252.225-7001 requires that the contractor provide domestic end products unless it proposes (and is awarded a contract) to provide nonqualifying country end products. The combined synopsis and request for quotations, however, did not make DFARS 252.225-7000 applicable. DFARS 252.225-7000 requires that the contractor submit a Buy American Act-Balance of Payments Program certificate. The file for the basic contract contained an incomplete Buy American Act-Trade Agreements-Balance of Payments Program Certificate. The certificate was inappropriate for the procurement because, as stated in DFARS 225.403-70, the Trade Agreements Act does not apply to clothing and related items. The contracting officer should have included DFARS 252.225-7000 in the combined synopsis and request for quotations and incorporated DFARS 252.225-7001 in the basic contract. The wetsuits provided by the contractor did not qualify as domestic end products.

DFARS 225.105(5) states that to qualify as a domestic end product, the product must be manufactured in the United States and the costs of its United States and qualifying country components must exceed 50 percent of the cost of all of its components. The contractor manufactured the wetsuits in California, but imported the primary material (neoprene) in the wetsuits from Japan, a nonqualifying country. The FISC-San Diego purchased the wetsuits for graduates of the Navy's Surface Rescue Swimmer Course. The Director of Simplified Acquisition stated that the contracting officer for the contract was no longer employed by FISC-San Diego. She further stated that the wetsuits are still being purchased for the graduates. The Director was not aware that the neoprene was imported from Japan and that the gloves were imported from China. The contracting officer apparently awarded the delivery order without considering the Buy American Act and did not obtain the determination required by DFARS 225.102 that domestic wetsuits are not reasonably available before awarding the contract for nonqualifying country end products.

Air Force Organizations

Air Force Academy

Contracts: F05611-99-D-M502/5001 and 5002;
F05611-98-D-M001/5000 and 5001

Awarded: February 11, and July 27, 1999;
February 20, and March 9, 1998

Type of Contract: Indefinite Delivery/Indefinite Quantity

Contract Values: \$94,550 and \$12,799;
\$59,923 and \$11,315

Items Purchased: Athletic Shoes

Procurement Method: Competitive

Contractors: Blick's Sporting Goods, Colorado Springs, CO and
IN2 Sports, Incorporated, Denver, CO

Details: The contracting officer specified athletic shoes by brand name (Asics) in the solicitations for contracts F05611-99-D-M502 and F05611-98-D-M001. The customer (Cadet Issue Store) specifically requested the Asics athletic shoes because the shoes were recommended by the Cadet Uniform Board and approved by the Superintendent of the Academy and the Cadet Financial Advisory Group. The Cadet Uniform Board chooses items that will be used and worn by all cadets. The Superintendent of the Academy is the final approval authority on all Cadet Uniform Board recommendations. The Podiatry Consultant to the Air Force Surgeon General recommended the Asics shoes to the Cadet Uniform Board. In 1991, the Podiatry Consultant conducted an Academy study that involved testing 14 different brands and types of athletic shoes by medical and military personnel running more than 3 miles per day, 3 or more days per week. None of the tests included shoes manufactured in the United States. The study was prompted by the number of foot injuries sustained by cadets during training. Based on the study results, the Podiatry Consultant recommended the Asics shoes to the Cadet Uniform Board. Air Force officials at the Academy felt they were exempt from the Berry Amendment and Buy American Act because the working capital fund, commonly referred to as the Cadet Stock Fund, used to finance the contracts is not an appropriated fund. The Cadet Stock Fund is a revolving stock fund that is reimbursed through the Cadet Trust Account after a cadet has purchased items from the Cadet Issue Store. Air Force cadets receive \$5,000 advance pay upon entering the Academy and also bring \$2,500 of their own funds. The \$7,500 is maintained in the individual cadet's pay account. The cadets give "power of attorney" to the Superintendent of the Academy to handle all of their pay and initial deposit. The Cadet Financial Advisory Group approves and controls cadet expenditures considering cash allowances, cadet indebtedness, deductions and charges, adequacy of held pay, and entrance deposit. When a cadet charges an item at the Cadet Issue Store, funds are transferred from the cadet's pay account to the Cadet Trust Fund. At that point, the Cadet Trust Fund reimburses the Cadet Stock Fund. The Air Force officials contend that although military [cadet] pay is appropriated, when the funds are paid to cadets [deposited in the cadet's individual pay account] the funds become personal funds of the cadet and are not available to DoD to purchase items other than uniforms and academic supplies for the cadet. Air Force officials also contend that the Buy American Act and the Berry Amendment do not apply because

the Cadet Issue Store is a “commissary similar” facility established to resell items to the cadets. However, Air Force officials could not identify any statute, regulation, ruling, or other documentation that states that purchases financed with the Cadet Stock Fund are not subject to provisions of the Buy American Act or the Berry Amendment.

On January 13, 1999, the Chief of Contracting, Logistics Division, signed a waiver of Buy American Act and Berry Amendment restrictions for Asics athletic shoes citing authority at DFARS 225.7005(a)(2), “Waiver of Certain Restrictions,” that permits the Head of the Contracting Activity to waive the restrictions for certain purchases under 10 U.S.C. 2534(a). The waiver was invalid because 10 U.S.C. 2534(a) does not include military clothing and related items. Additionally, the Chief of Contracting did not have authority to waive the Berry Amendment. The Berry Amendment was applicable to both contracts and the orders issued under the contracts because the anticipated value of the contracts exceeded the \$100,000 Berry Amendment threshold. Contract F05611-99-D-M502 was awarded with a ceiling value of \$404,273 through option year ending 30 September 2002. Order 5001 had an award value of \$94,550. Order 5002 for \$12,799 was a follow-on to Order 5001. Contract F05611-98-D-M001 was awarded with a ceiling value of \$139,382. Order 5000 was awarded for \$59,923. Order 5001 for \$11,315 was a follow-on order. The Asics shoes were manufactured in China.

Dover Air Force Base

Contract: F07603-99-P-0101 with modification P0001, and F07603-98-P-0431

Awarded: April 2, 1999, and September 3, 1998

Type of Contract: Purchase Orders

Contract Value: \$32,400 and \$2,694

Items Purchased: Gloves

Procurement Method: Competitive

Contractor: DNA Distribution, Incorporated, Drums, PA, and Gem Safety Products, Allentown, PA

Details: The contracting officer incorrectly included FAR 52.225-3 and 52.225-9, “Trade Agreements,” in purchase order F07603-99-P-0101. The contracting officer for F07603-98-P-0431 did not include any Buy American Act clauses in the purchase order. The contracting officers should have included

DFARS 252.225-7000 in the solicitations and DFARS 252.225-7001 in the purchase orders as required by DFARS 225.109. The contractors obtained the gloves from Southwest Motorsports Enterprises, Incorporated, the United States source of the heat resistant gloves, who stated that it developed the gloves specifically for the military and that the gloves are in use at Air Force bases world-wide. The purchase order solicitations specified Southwest Motorsports part numbers. Documents provided by Southwest Motorsports state that the gloves are manufactured in South Korea. The contracting officers for the two purchase orders were aware that the gloves were manufactured in South Korea, a nonqualifying country, but believed that no further action was required to comply with the Buy American Act because South Korea is a designated country under the Trade Agreements Act. The contracting officers did not determine whether the gloves (a clothing item) was an eligible product under the Trade Agreements Act. As stated in DFARS 225.403-70, clothing items are not eligible products under the Trade

Agreements Act. The contracting officers did not obtain the determination required by DFARS 225.102 that the gloves were not reasonably available from domestic sources before awarding the purchase orders for end products from a nonqualifying country.

Edwards Air Force Base

Contracts: F04700-99-P-0091, F04700-99-P-0143, and F04700-99-P-0147

Awarded: March 23, 1999, July 19, 1999, and July 22, 1999

Type of Contracts: Purchase orders

Contract Values: \$13,662, \$2,613, and \$5,489

Items Purchased: Heat Resistant Gloves

Procurement Method: Noncompetitive

Contractor: Southwest Motor Sports, Phoenix, AZ

Details: The three purchase orders were for the type of heat resistant gloves that Edwards Air Force Base routinely purchased from Southwest Motor Sports. Documentation in the purchase order files stated that an earlier contract was competitively awarded to Southwest Motor Sports, and that the gloves offered by Southwest Motor Sports were the only gloves that met the Air Force requirements. An Edwards Air Force Base contracting officer stated that subsequent orders for the gloves were noncompetitively awarded and arranged by calling Southwest Motor Sports and ordering a quantity of gloves. There was no evidence in the purchase order files that the contracting officers advised Southwest Motor Sports that only domestic or qualifying country end products were acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. The written purchase orders for the gloves correctly contained DFARS 252.225-7001, which requires that the contractor provide domestic end products unless it proposes (and is awarded a contract) to provide nonqualifying country end products. The gloves provided by the contractor did not qualify as domestic end products because they were manufactured in South Korea, a nonqualifying country, of South Korean materials (a fact confirmed by the contractor). The contracting officers and the customer (Supply) were not aware that the gloves were made in South Korea and neither tried to determine the place of origin before awarding the purchase orders. One contracting officer stated that because of the small dollar value and frequent nature of the purchase orders, the requirements of the Buy American Act were not followed for every stand-alone order.

Grand Forks Air Force Base

Contracts: F32605-99-P-0034 and F32605-98-P-0222

Awarded: March 16, 1999, and August 13, 1998

Type of Contracts: Purchase Orders

Contract Values: \$35,504 and \$7,655

Items Purchased: Gloves

Procurement Method: Competitive

Contractor: Midwest Parts & Contracting (now known as Dakota Outerwear Co.), Minot, ND

Details: Purchase order 0034 was for Gortex/thinsulate gloves and green mechanic/combat vehicle gloves. Purchase order 0222 was for green mechanic/combat vehicle gloves only. The contracting officers did not include DFARS 252.225-7001 in the purchase orders as required by DFARS 225.109. In the case of the oral solicitation for purchase order F32605-94-P-0222, the contracting officer should have informed the potential contractors that only domestic or qualifying country end products were acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. The file for purchase order F32605-99-P-0034 contained a copy of the Buy American Act-Balance of Payments Program certificate required by DFARS 252.225-7000. However, lines were drawn through the spaces for showing line items numbers and country of origin with no explanatory information provided. The contractor provided documentation that the gloves for both purchase orders were manufactured in Pakistan or China, both nonqualifying countries. The contracting officers did not determine where the gloves were manufactured nor did they obtain the determination required by DFARS 225.102 that the gloves were not reasonably available from domestic sources before awarding the purchase orders for end products from a nonqualifying country.

Contract: F32605-98-P-0129

Awarded: February 13, 1998

Type of Contracts: Purchase Order

Contract Value: \$51,000

Items Purchased: Gloves

Procurement Method: Competitive

Contractor: G.S.A. Incorporated, Rapid City, SD

Details: The contracting officer did not include DFARS 252.225-7001 in the purchase order as required by DFARS 225.109. However, the purchase order file contained a completed Buy American Act-Balance of Payment Program certificate required by DFARS 252.225-7000. From the February 10, 1998, date and the facsimile machine phone on the certificate, it appears that G.S.A. Incorporated completed the certificate 3 days before purchase order award. The certificate states that all contract line items are qualifying country end products. G.S.A. Incorporated purchased the gloves from Cabela's, Kearney, NB, a sporting goods outfitter. According to a Cabela's representative, the gortex/thinsulate gloves provided to G.S.A. Incorporated were manufactured in China, a nonqualifying country. The contracting officer stated that he accepted the vendor's certification that the acquisition complied with the Buy American Act. However, on February 11, 1998, Grand Forks Air Force Base supply personnel evaluated gloves

offered by 10 contractors, including G.S.A. Incorporated, and prepared a memorandum for the record stating that none of the gloves offered were made in the United States. The contracting officer, who is no longer at the Base, should have been aware of the memorandum because it was provided to her 2 days before the purchase order award and included in the purchase order file. The contracting officer did not obtain from the chief of the contracting office a determination that domestic gloves were not reasonably available as required by DFARS 225.102.

Maxwell Air Force Base, AL

Contract: F01600-99-P-0428

Awarded: September 29, 1999

Type of Contracts: Purchase Order

Contract Values: \$15,288

Items Purchases: Jackets embroidered with Air Force emblem and wording

Procurement Method: Competitive

Contractor: Gear For Sports Incorporated, Lenexa, KS

Details: The contracting office received the purchase request on September 20, 1999; 10 days before fiscal year end September 30, 1999, necessitating a short turnaround for contract award. The contracting officer did not post the requirement on the Electronic Posting System because of the time constraints. The contracting officer sought to satisfy the requiring organization's request for a specific jacket from Gear For Sports Incorporated, and conducted oral solicitations with two contractors. Gear for Sports was the low bidder. The purchase order file contained no evidence that the contracting officer advised potential contractors that only domestic or qualifying country end products were acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. The contracting officer correctly incorporated DFARS Clause 252.225-7001 in the purchase order, but it was not applied. The contractor provided jackets made in Taiwan, a nonqualifying country, of Taiwanese components (a fact confirmed by the contractor). The contracting officer did not determine the country of origin of the jackets and did not obtain the determination, required by DFARS 225.102, that the jackets were not reasonably available from domestic sources before awarding the purchase order for end products from a nonqualifying country.

Contract: F01600-99-P-0366

Awarded: August 31, 1999

Type of Contracts: Purchase Order

Contract Values: \$4,288 (Includes \$3,988 for shoes manufactured in a nonqualifying country)

Items Purchases: Safety Shoes

Procurement Method: Noncompetitive

Contractor: Atlas Safety Equipment Company, Birmingham, AL

Details: The requiring organization (908th Air Force Reserve) specified custom-fit safety shoes and suggested Atlas Safety Equipment Company as a source. Atlas Safety Equipment, a distributor for several shoe companies, provided safety shoes in various types and sizes through a mobile service to authorized personnel of the 908th Air Force Reserve. The contracting officer limited the cost to \$75 a pair and

determined that the purchase order price was fair and reasonable based on historical cost data from a contract that was competitively awarded in 1998 for a similar requirement. The purchase order file contained no evidence that the contracting officer advised Atlas Safety Equipment Company that only domestic or qualifying country end products were acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. The contracting officer correctly incorporated DFARS Clause 252.225-7001 in the purchase order, but it was not applied. The contracting officer did not determine the country of origin and was not aware that the shoes were made in China. Atlas Safety Equipment Company and the various shoe companies provided us with documentation showing that the shoes were manufactured in China.

Contract: F01600-99-P-0372

Awarded: September 7, 1999

Type of Contracts: Purchase Order

Contract Values: \$14,313

Items Purchases: Sport Shirts, Fleece Shirts, T-Shirts, Fleece Pants, Nylon Jackets, Nylon Pants, and Running Shorts

Procurement Method: Competitive

Contractor: F&G Graphics, Jacksonville, FL

Details: The requiring organization (Officer Training School) specified sports shirts, shirts, pants, jackets, and running shorts printed with its logo. The contractor obtained the items from other vendors in the United States, who documented that the nylon pants were made in Bangladesh; the nylon jackets were made in Taiwan; and the pique sports shirts were made in Honduras of United States components. The contracting officer included DFARS 252.225-7001 in the purchase order, but did not enforce it. Contracting personnel were not familiar with the requirements of the Buy American Act.

Peterson Air Force Base

Contract: F05604-98-P-2471

Awarded: July 22, 1998

Type of Contract: Purchase Order

Contract Value: \$4,588 (included \$3,148 for items manufactured in nonqualifying countries)

Items Purchased: Sweatshirts, Sweatpants, T-Shirts, and Shorts with Silk-Screened Logos

Procurement Method: Noncompetitive

Contractor: Tayco Corporation, Colorado Springs, CO

Details: On July 22, 1998, the requiring organization (13th Air Support Operations Squadron) requested that the contracting officer award a sole-source contract because Tayco Corporation was the only source that could provide the items needed for an athletic event at Fort Carson in 2 weeks. The contract specialist stated that he conducted oral solicitations via phone with three contractors. However, the abstract of bids and other documents in the purchase order file indicate only one source was contacted and that the purchase order was noncompetitive. The contract specialist also stated that he verbally asked Tayco Corporation if it would abide by the contract clauses, but did not mention any specific clause such as the DFARS

Buy American Act clause. DFARS 225.109 requires that in oral solicitations prospective vendors be informed that only domestic and qualifying country end products are acceptable unless the price of a nonqualifying country end product is the low offer under the evaluation procedures in DFARS 225.105. The contracting officer, who is no longer employed at the Base, did not include DFARS 252.225-7001 in the purchase order, and the contractor provided items made in Mexico and Honduras, both nonqualifying countries. The contracting officer did not determine the country of origin of the jackets and did not obtain the determination required by DFARS 225.102 that the items were not reasonably available from domestic sources before awarding the purchase order for end products from nonqualifying countries. Contracting officials at Peterson Air Force Base were not aware that the T-shirts, sweatpants, and sweatshirts, valued at \$3,148 were made in Mexico and Honduras.

Contract: F05604-98-P-1860

Awarded: April 8, 1998

Type of Contract: Purchase Order

Contract Value: \$3,024 (included \$2,568 for items manufactured in nonqualifying countries)

Items Purchased: Baseball Jerseys, Caps, and Socks

Procurement Method: Competitive

Contractor: All American Sports Center, Colorado Springs, CO

Details: The requiring organization (Youth Baseball Program) specified baseball jerseys, socks, and caps with youth baseball patches sewn on. According to purchase order file documents, the contracting officer, who is no longer employed at the Base, provided written solicitations to four vendors and received two offers. However, the contracting officer did not include DFARS 252.225-7000 and DFARS 252.225-7001 in the solicitation and purchase order, and the contractor provided jerseys manufactured in Mexico, and caps manufactured in Bangladesh and Sri Lanka, nonqualifying countries. The contracting officer did not determine the country of origin of the items and did not obtain the determination required by DFARS 225.102 that the items were not reasonably available from domestic sources before awarding the purchase order for end products from nonqualifying countries.

Appendix E. Actions Taken After the Audit of FY 1996 and FY 1997 Procurements of Military Clothing and Related Items at Specific Installations

Army

Army Garrison, Aberdeen Proving Ground, MD. The contracting officer removed shoe styles manufactured in Malaysia from its contract with Lehigh Safety Shoe Company. Additionally, the contracting officer directed the contracting officer representative not to order any more shoes manufactured in China.

Army Garrison, Fort George G. Meade, MD. Contracting officials stated that they have not awarded any contracts for safety shoes since September 1997. The officials further stated that the requiring activities serviced by the Army Garrison contracting office now use the Government purchase card to buy safety shoes or pay a shoe allowance to eligible employees to purchase their own shoes.

Letterkenny Army Depot, PA. In June 2001, contracting officials suspended the procurement of foreign shoe styles included in its contract with Iron Age Protective Company and have not added any new foreign shoes to the contract. The prior audit, as well as the current audit, identified Letterkenny Army Depot procurements of shoes manufactured in nonqualifying countries

Military Academy, NY. In June 2001, the Academy began a formal training program on the Buy American Act and the Berry Amendment. Additionally, during the audit, they appeared more diligent in obtaining appropriate waivers, and including the appropriate DFARS provisions and clauses in solicitations and contracts. The prior audit, as well as the current audit, identified Military Academy procurements of clothing items manufactured in nonqualifying countries.

Navy

Fleet and Industrial Supply Center (FISC), Bremerton, WA. In December 1998, FISC Bremerton developed a plan to ensure compliance with the Buy American Act and the Berry Amendment. Training materials were issued and training classes were developed. A checklist and a matrix were developed for contracting officers to use as guidelines for including and applying DFARS provisions and clauses to procurements. The prior audit, as well as the current audit, identified FISC Bremerton procurements of gloves manufactured in nonqualifying countries.

Air Force

Air Force Academy, Colorado Springs, CO. In November 2000, Academy contracting personnel requested training material from the Director, Defense Procurement (Foreign Contracting) and used the material provided to conduct internal training on the Buy American Act and the Berry Amendment. The prior audit, as well as the current audit, identified Air Force Academy procurements of athletic shoes manufactured in nonqualifying countries.

Air National Guard, Birmingham, AL. Contracting personnel reviewed the findings of the previous audit and reviewed the appropriate clauses to ensure compliance.

Elmendorf Air Force Base, AK. Contracting personnel reviewed findings of the previous audit, conducted training, and added specific instructions on the Buy American Act and the Berry Amendment to the buyer's checklist.

Homestead Air Reserve Base, FL. Contracting personnel received centralized Berry Amendment and Buy American Act training from Air Force Reserve Headquarters contracting personnel.

Keesler Air Force Base, MS. Contracting personnel revised the Commodities Quote Sheet to ensure that the buyer advises the vendor on Buy American Act requirements and obtains representations and certifications for purchase orders over \$2,500.

Mississippi Air National Guard, Meridian, MS. Contracting personnel conducted internal training during the first half of 1999. Two checklists were generated, one as a general checklist for purchase orders over \$2,500, and another as a "Buy American Checklist" with appropriate DFARS references. The Buy American Act-Balance of Payments Program Certificate is required from all vendors during the solicitation process, and the certificate is reviewed prior to issuing a purchase order.

Pittsburgh Air Reserve Station, Pittsburgh, PA. Contracting personnel received centralized Berry Amendment and Buy American Act training from Air Force Reserve Headquarters contracting personnel.

Appendix F. USSOCOM Comments on the Finding and Audit Response

USSOCOM Comments on the Finding. The Acquisition Executive, U.S. Special Operations Command (USSOCOM) nonconcurred with the finding, stating that USSOCOM's review of its 34 contract actions indicates that problems with properly applying Buy American Act regulations are not as widespread as outlined. The Acquisition Executive believed the auditors may have been unfamiliar with the location of contract clauses in IDIQ contracts and General Services Administration (GSA) schedules, and that the auditors did not check the original contract files, which specify the terms of subsequent orders. The Acquisition Executive stated that the draft report indicated that DFARS provision 252.225-7000 was not present in the orders awarded under IDIQ contracts USZA22-98-D0008 and USZA22-99-D0004. The Acquisition Executive also stated GSA includes FAR 52.225-5, "Trade Agreements," in its schedule contracts, and the FAR clause requires domestic materials or material from designated countries be provided. Application of FAR 52.225-5 covers all DoD foreign acquisition concerns except for the Berry Amendment and there is no requirement to add DFARS 252.225-7002 or 252.225-7000. Further, the ordering contracting officers cannot change the terms of the schedules. In regards to 14 purchase orders issued by the Navy Special Warfare Development Group missing DFARS 252.225-7000 and 252.225-7003, the Acquisition Executive agreed that 7 purchase orders that were more than \$25,000 should have had DFARS 252.225-7000. For actions less than \$25,000, FAR 13.106-1(c) allows oral solicitations, but written certifications such as those required by DFARS 252.225-7000 are not required; all required information is requested by telephone. Concerning the BPA order, the Acquisition Executive stated that the BPA needed to be checked to determine clauses/provisions present, not the order, and that USSOCOM was not able to access the BPA. The Acquisition Executive stated that his point of contact discussed USSOCOM's concerns with the lead auditor, and the auditor agreed with the nonconcurrence. The Acquisition Executive recommended that DoD consider rewriting DFARS part 225 and suggested possible inclusion of a matrix or a decision tree to help determine clauses needed when using simplified acquisition methods.

Audit Response. We do not agree with the conclusion that problems with applying Buy American Act regulations are not widespread. The USSOCOM comments are based on incomplete information inadvertently supplied by the audit team in response to questions regarding the draft report. The information provided was a spreadsheet that identified, among other things, whether certain DFARS provisions and clauses were in each contract action in the audit sample. The analysis to determine whether the provisions and clauses were applicable to each contract action was not provided to USSOCOM by the audit team. Accordingly, we do not agree with the conclusion that the auditors may have been unfamiliar with the location of contract clauses in IDIQ contracts and GSA schedules.

We also disagree that the draft report states that DFARS 252.225-7000 was not present in the orders awarded under the IDIQ contracts. During the audit, we obtained copies of the IDIQ contracts from USSOCOM and determined that the Berry Amendment applied to the two contracts and the five orders issued against the

contracts. The contracts appropriately contained the Berry Amendment clause, DFARS 252.225-7012. We also noted that the contracts unnecessarily contained DFARS 252.225-7001 (Buy American Act), which indicates that the contracting officer did not have a clear understanding of when to include the Buy American Act or the Berry Amendment clause. DFARS 225.109(d) states that DFARS 252.225-7001 need not be used in solicitations and contracts when “end products are restricted to domestic or domestic and qualifying country sources . . . (see 225.70).” The Berry Amendment restricts end products to domestic sources (see 225.7002). We did not mention in the report the unnecessary use of DFARS 225.252-7001 because the correct Berry Amendment clause was also included in the contracts. The USSOCOM IDIQ orders are included in the statement on page 9 of the report that “the contracting officers for 103 contract actions were sufficiently familiar with the guidance to include DFARS 252.335-7012 in the contracts.”

We agree that GSA includes FAR 52.225-5 in its schedule contracts. We do not agree, however, that the application of FAR 52.225-5 covers all DoD foreign acquisition concerns except the Berry Amendment. During this audit and the previous audit, GSA advised the auditors that FAR 52.225-5 is included in the schedule contracts because the contract values exceed the threshold (currently \$177,000) where the Trade Agreements Act applies. However, the Trade Agreements Act does not apply to procurements of military clothing and related items. The DFARS 225.403-70, “Products Subject to Trade Agreement Acts,” lists the foreign end products that are subject to the Trade Agreements Act and the North American Free Trade Agreement (NAFTA) by Federal supply group. The items purchased on the GSA schedules in question are in Federal Supply Group 84 and are not listed as products subject to the Trade Agreements Act and NAFTA. The guidance at FAR 25.400(b), “Scope of Subpart,” requires that agency regulations be followed for application of trade agreements that are unique to individual agencies, and DFARS 208.404(a), “Using Schedules,” states that the ordering office must apply the procedures of DFARS part 225 and FAR part 25, “Foreign Acquisition,” when using a Federal supply schedule that lists both foreign and domestic items that will meet the needs of the requiring activity. For procurements that are subject to the Trade Agreements Act, DFARS 225.1101(6), “Acquisition of Supplies,” requires that the clause at DFARS 252.225-7007 be used instead of the clause at FAR 52.225-5. Additionally, we are not aware of any guidance prohibiting DoD contracting officers, when ordering items that are subject to the Buy American Act but not the Trade Agreements Act, from advising schedule contractors that DoD is required to procure items that comply with the Buy American Act, and that DFARS 252.225-7000 and -7001 pertain. If the schedule contractor is unable to provide items that comply with the Buy American Act, the contracting officer should obtain the items from another schedule contractor or another contractor who is willing to provide items that do comply.

We do not agree that the draft report stated that 14 USSOCOM purchase orders were missing DFARS provisions 252.225-7000 and -7003. We included in the report only those contracts and purchase orders that did not have DFARS clause 252.225-7001, which requires contractor compliance with the Buy American Act. The USSOCOM purchase orders included DFARS 252.225.7001. We agree with the Acquisition Executive comment that for oral solicitations the required information is requested by telephone, and written certifications are not required.

However, we found no evidence in the contract files that the contractors were informed, as required by DFARS 225.109(b), that only domestic and qualifying country end products are acceptable unless one of the stated exceptions applies, and USSOCOM contracting officials did not provide any evidence. Concerning the BPA order, such as a checklist, that the contractors may have been informed we were unable to conclusively determine whether DFARS 252.225-7001 was included in the BPA. Therefore, we changed the report to increase the number of contract actions for which we could not determine whether the clause was included from 26 to 27, and decreased the number of contract actions that did not include the clause from 357 to 356.

In regards to the recommendation that DFARS part 225 be rewritten, the Defense Acquisition Regulation Council is in the process of rewriting DFARS part 225, "Foreign Acquisition," and estimates that the rewrite will be published for comment as a proposed rule by mid-April 2002.

Appendix G. Navy Guidance Re-emphasizing Importance of Buy American Act and Berry Amendment



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

MAY 7 2001

MEMORANDUM FOR DISTRIBUTION

Subj: FOREIGN ACQUISITION RESTRICTIONS

Recent events have reminded us of the importance of universal awareness of the many laws and regulations we must follow in defense acquisition and of the reasons for them. In particular, please re-emphasize to all your contracting and acquisition personnel the importance and significance of the Buy American Act (41 U.S.C. 10a et seq) and the Berry Amendment (10 U.S.C. 2241, note). Except as provided in the Act or in FAR/DFARS Subpart 25/225.1, contracting officers must apply the requirements of the Buy American Act to supply contracts exceeding the micro-purchase threshold, and to service contracts that involve the furnishing of supplies when the supply portion exceeds the micro-purchase threshold. Except as provided in the statute or in DFARS 225.7002, contracting officers must apply the requirements of the Berry Amendment to actions at or above the simplified acquisition threshold. These restrictions also apply to orders placed under a Federal Supply Schedule (FSS) contract. The General Services Administration (GSA) is not subject to the Berry Amendment, since it applies only to the Department of Defense. Therefore, GSA does not impose the requirements of the Berry Amendment in FSS contracts. Contracting officers must not place orders under an FSS contract if the procurement would fail to comply with either the Buy American Act or the Berry Amendment.

M. D. Jaggard
M. D. Jaggard
Executive Director (Acting)
Acquisition and Business
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DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

MAY 14 2001

MEMORANDUM FOR DISTRIBUTION

Subj: CHANGE TO NAVY ACQUISITION PROCEDURES SUPPLEMENT (NAPS)
PERTAINING TO BERRY AMENDMENT (10 U.S.C. 2241, NOTE)

Ref: (a) DEPSECDEF memo of May 1, 2001

Encl: (1) NAPS Change #97-15

Reference (a) restricted the authority of the Secretaries of the Military Departments to delegate their authority to make determinations in accordance with the Berry Amendment, and rescinded all existing delegations. NAPS Section 5225.7002 is changed as noted in the enclosure (1) to reflect this new policy.

This change is effective immediately, and will be reflected in the NAPS Online.

M. E. Eggard
M. E. Eggard
CAPT, SC, USN
Executive Director (Acting)
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NAVY ACQUISITION PROCEDURES SUPPLEMENT CHANGE #97-15

NAPS Section 5225.7002 is changed as follows:

PART 5225

FOREIGN ACQUISITION

**SUBPART 5225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND
OTHER STATUTORY RESTRICTIONS ON FOREIGN ACQUISITION**

5225.7002 Restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools.

5225.7002-2 (DFARS 225.7002-2) Exceptions.

(a) Requests for Secretary of the Navy determinations should be submitted through ABM.

Appendix H. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition, Technology, and Logistics
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Director, Defense Procurement
Under Secretary of Defense (Comptroller)
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Department of the Army Comments



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

SAAL-PP

15 FEB 2002

MEMORANDUM FOR ACTING DIRECTOR, CONTRACT MANAGEMENT
DIRECTORATE, INSPECTOR GENERAL,
DEPARTMENT OF DEFENSE, 400 ARMY NAVY
DRIVE, ARLINGTON, VA 22202-4704

SUBJECT: Audit Report on Buy American Act Issues on Procurement of
Military Clothing (Project No. D2001CH-0046)

The Army Acquisition Executive carefully considered the recommendation contained in your November 7, 2001 memorandum, subject as above, to establish special procedures for solicitations and contract awards for military clothing procurements subject to Buy American Act and the Berry Amendment. It was decided that current review procedures coupled with a stern field reminder should adequately preclude or at least lessen violations in future Army acquisitions of military clothing. In a memorandum dated February 14, 2002 (copy attached), the Army Principal Assistants Responsible for Contracting (PARCs) were not only reminded of the restrictions imposed by the Buy American Act and Berry Amendment but were enjoined to comply on future acquisitions.

My staff point of contact for this action is Mr. Charles Riley, commercial 703-681-6700: DSN 761-6700; or e-mail charles.riley@saalt.army.mil.

A handwritten signature in black ink, appearing to read "Lynn M. Yane" or "Lynn M. Clarke".

Emily Clarke
Director for Procurement and
Industrial Base Policy

Enclosure

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DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
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REPLY TO
ATTENTION OF

14 FEB 2002

SAAL-PP

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Buy American Act and Berry Amendment Restrictions on the Procurement of Military Clothing and Related Items

The following references provide information relating to the Buy American Act and the Berry Amendment.

- a. Office of the Inspector General, Department of Defense (DoDIG) Report Number 99-023, Procurement of Military Clothing and Related Items by Military Organizations, October 29, 1998.
- b. The DoDIG Project No. D2001CH-0046 (draft), Buy American Act Issues on Procurements of Military Clothing, November 7, 2001.
- c. Title 41, United States Code (U.S.C.), Section 10a (and following sections), the Buy American Act.
- d. Public Law 107-107, National Defense Authorization Act for Fiscal Year 2002, December 28, 2001, specifically Section 832, Codification and Modification of Provision of Law Known as the "Berry Amendment," to be permanently codified as Title 10, United States Code (U.S.C.), Section 2533a (previously 10 U.S.C. Section 2241 note).
- e. Memorandum, Director, Defense Procurement, March 2, 1999, subject: Compliance with the Buy American Act and Other Statutory Restrictions on Foreign Acquisition (Enclosure 1).
- f. Memorandum, Deputy Secretary of Defense, May 1, 2001, subject: The Berry Amendment (Enclosure 2).

References a. and b. (DoDIG reports) have identified several Army violations of statutory restrictions on procurement of military clothing and related items. These restrictions come from reference c., the Buy American Act, as implemented by Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 225.1, and reference d., the Berry Amendment, as implemented by DFARS Subpart 225.7002.

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-2-

It is imperative that Army solicitations and resulting contracts for military clothing and related items contain the required clauses and provisions. Furthermore, contracting officers are responsible for following all applicable law, regulation, and policy during source selection, award, and contract administration. The direction to all contracting officers contained in the reference e. memorandum (Enclosure 1) remains valid. Furthermore, the Army must comply with the procedures of the reference f. memorandum (Enclosure 2).

To properly address this continuing problem, increased emphasis must be placed on compliance with the Buy American Act and Berry Amendment as part of the contracting process. Future DoDIG reviews on the subject must show a marked improvement by Army procurement offices.

My point of contact is Mr. Charles Riley, commercial 703-681-6700; DSN 761-6700; or e-mail charles.riley@saalt.army.mil.


For Claude M. Bolton, Jr.
Army Acquisition Executive

Enclosures

DISTRIBUTION:

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5001 Eisenhower Avenue, Alexandria, VA 22333-0001
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U.S. Army Robert Morris Acquisition Center, ATTN: AMSSB-AC,
4118 Susquehanna Avenue, Aberdeen Proving Ground, MD 21005-5002
U.S. Army Communications-Electronics Command, ATTN: AMSEL-AC,
Building 1208E, Fort Monmouth, NJ 07703-5000
U.S. Army Operations Support Command, ATTN: AMSOS-CC, Building 350,
5th Floor, NW Wing, Rock Island, IL 61299-6000
U.S. Army Tank-Automotive and Armaments Command, ATTN: AMSTA-AQ,
Building 231, Warren, MI 48397-5000
Defense Contracting Command-Washington, 5200 Army Pentagon,
Washington, DC 20310-5200
Headquarters Forces Command, ATTN: AFLG-PR, 1777 Hardee Avenue
S.W., Fort McPherson, GA 30330-1062

DISTRIBUTION: (CONT)

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U.S. Army Intelligence and Security Command, ATTN: IAPC, 8825 Beulah Street, Fort Belvoir, VA 22060-5246
U.S. Army Medical Research and Materiel Command, ATTN: MCMR-AAZ-A, 820 Chandler Street, Fort Detrick, MD 21702-5014
U.S. Army Military District of Washington, Fort Lesley J. McNair, ATTN: ANPC 103 Third Avenue SW, Building 39, Room 5B, Fort Lesley J. McNair, DC 20319-5058
Military Traffic Management Command, ATTN: MTAQ, Hoffman Building II, 200 Stovall Street, Alexandria, VA 22332-5000
U.S. Army Space and Missile Defense Command, ATTN: SMDC-CM (PARC), P.O. Box 1500, Huntsville, AL 35807-3801
U.S. Army Training and Doctrine Command, DCSBOS, ATTN: ATBO-A, 5 North Gato Road, Building 5F, Room 306, Fort Monroe, VA 23651-1048
U.S. Army Contracting Command, Europe, ATTN: AEAPR-PA (PARC), Unit 29331, APO AE 09266
Headquarters, Eighth United States Army, ATTN: FKAQ/EAAQ, Unit 15237, APO AP 96205-0010
U.S. Army, Pacific, ATTN: APAM, B Street, Building T-115, Fort Shafter, HI 96858-5100
U.S. Army South, ATTN: PARC, P.O. Box 34000, Building 223, Fort Buchanan, PR 00934
U.S. Army Corps of Engineers, ATTN: CEPR-ZA, 441 G Street, NW, Washington, DC 20314-1000
National Guard Bureau, ATTN: NGB-AQ, Suite 8300, Jefferson Plaza 1, 1411 Jefferson Davis Highway, Arlington, VA 22202-3231

CF:

Deputy Assistant Secretary of the Army for Financial Operations, Pentagon, Room 3E588, Washington, DC 20310-0103
Assistant Deputy Chief of Staff for Research, Development and Acquisition (Acquisition, Contracting and Program Management), HQ, U.S. Army Materiel Command, ATTN: AMCRDA-A, 5001 Eisenhower Avenue, Alexandria, VA 22333-0001
Chief, Contract Policy Team, Headquarters, U.S. Army Materiel Command, ATTN: AMCRDA-AP, 5001 Eisenhower Avenue, Alexandria, VA 22333-0001
Chief, Program Management and Acquisition Support Office, Headquarters, U.S. Army Materiel Command, ATTN: AMCRDA-AM, 5001 Eisenhower Avenue, Alexandria, VA 22333-0001



ACQUISITION AND
TECHNOLOGY

DP/FC

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

March 2, 1999

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT, ASN(RD&A)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA(RD&A)
COMMANDER, DEFENSE CONTRACT MANAGEMENT COMMAND

SUBJECT: Compliance with the Buy American Act and Other Statutory
Restrictions on Foreign Acquisition

I am concerned by the findings of the recent audit report by the Office of the Inspector General, DoD (OIG), Project No. BCH-5001, *Procurement of Military Clothing and Related Items by Military Organizations*, that concludes that certain Department of Defense procurements during Fiscal Years 1996 and 1997 did not comply with the requirements of the Buy American Act (41 U.S.C. 10a *et seq.*), implemented at Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 225.1, or the Berry Amendment (10 U.S.C. 2241, note), implemented at DFARS Subpart 225.7002. Nearly half of the solicitations and contracts examined by the OIG were found not to have incorporated or enforced the required relevant provisions or clauses prescribed by the DFARS for these statutes.

Please ensure that contracting officers review and comply with, the requirements of the Buy American Act and the Berry Amendment. Except as specifically provided in the Act or in DFARS Subpart 225.1, contracting officers must apply the requirements of the Buy American Act to supply contracts exceeding the micro-purchase threshold and to service contracts that involve furnishing of supplies when the supply portion exceeds the micro-purchase threshold. Except as specifically provided in the statute or DFARS Subpart 225.7002, contracting officers must apply the Berry Amendment to actions at or above the simplified acquisition threshold. These restrictions also apply to orders placed under a Federal Supply Schedule (FSS) contract. The General Services Administration (GSA) is not subject to the Berry Amendment and, therefore, does not impose the requirements of the Berry Amendment in a FSS contract. Contracting officers shall not place orders under an FSS contract if the procurement would fail to comply with either the Buy American Act or the Berry Amendment.

Eleanor Spector

Eleanor R. Spector
Director, Defense Procurement



ENCL 2



THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000



MAY 1 2001

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR
ACQUISITION, TECHNOLOGY AND LOGISTICS
SECRETARY OF THE ARMY
SECRETARY OF THE NAVY
SECRETARY OF THE AIR FORCE

SUBJECT: The Berry Amendment

The Berry Amendment (10 U.S.C. 2241, note) provides in part that, "No part of any appropriation or other funds available to the Department of Defense, except for purchases for amounts not greater than the simplified acquisition threshold covered by section 2304(g) of Title 10 United States Code, shall be available for the procurement of any article or item of food, clothing, tents, tarpaulins, covers, cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool (whether in the form of fiber or contained in fabrics, materials, or manufactured articles), or any item of individual equipment manufactured from or containing such fibers, yarn, fabrics, or materials, or specialty metals including stainless steel flatware, or hand measuring tools, not grown, reprocessed, reused or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles or items of food, individual equipment, tents, tarpaulins, covers, or clothing or any form of cotton or other natural fiber products, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, wool, or specialty metals including stainless steel flatware, grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations."

Effective immediately, your authority to make determinations in accordance with the Berry Amendment may not be redelegated. Any existing redelegations are hereby rescinded. Furthermore, prior to making any determination to waive the requirements of the Berry Amendment, you must present the requiring activity with alternatives that would not require a waiver under the Berry Amendment. Only after the requiring activity certifies, with specificity, in writing why such alternatives are unacceptable and you agree, may you make the necessary Berry Amendment determinations.

ENCL 2



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
FINANCIAL MANAGEMENT AND COMPTROLLER
109 ARMY PENTAGON
WASHINGTON DC 20310-0109
January 29, 2002



MEMORANDUM FOR THE ASSISTANT INSPECTOR GENERAL FOR
FOR AUDITING, DoDIG, 400 ARMY NAVY DRIVE,
(ROOM 801), ARLINGTON, VA 22202-4704

SUBJECT: DoDIG Draft Audit Report on Buy American Act Issues on
Procurements of Military Clothing (Project No. D2001CH-0046)

Attached are the Army's comments to the recommendation in the above subject report. We non-concur that potential Antideficiency Act violations occurred as a result of violations of the Berry Amendment and the Buy American Act.

Point of contact for this action is Mr. Peter Langevin who can be reached at (703) 607-3822 or email: langepb@hqda.army.mil.


Ernest J. Gregory
Deputy Assistant Secretary of the Army
(Financial Operations)

Attachment

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DRAFT AUDIT REPORT

Office of the Inspector General, DOD

Project No. D2001CH-0046 November 7, 2001

Draft Audit Report on Buy American Act Issues on Procurement of Military Clothing

FINDING:

Compliance with Buy American Act and Berry Amendment

RECOMMENDATION:

2. We recommend that the Assistant Secretaries (Financial Management and Comptroller) of the Army, Navy, and Air Force initiate, for the contracts under their cognizance listed in Tables 4 and 6 of this report, investigations of the potential Antideficiency Act violations arising from the use of appropriated funds to purchase items that do not comply with the Buy American Act or the Berry Amendment, fix responsibility, and if any violations of the Antideficiency Act occurred, comply with reporting requirements in DoD Directive 7200.1 and the DoD Financial Management Regulation. The Assistant Secretaries should also provide a copy of the preliminary review reports and the final formal investigation reports to the IG, DoD.

Assistant Secretary of the Army (Financial Management & Comptroller) (ASA (FM&C)) COMMENTS: We do not concur with the finding and recommendation that potential Antideficiency Act (ADA) violations occurred because of a violation of the Berry Amendment or Buy American Act.

There is no reason to conclude that Letterkenny Army Depot committed a potential ADA violation when they purchased safety shoes that did not comply with the Berry Amendment because no individual delivery order or the total value of all the delivery orders exceeded \$100,000.

In a previous audit, Report Number 99-023, "Procurement of Military Clothing and Related Items by Military Organizations," October 29, 1999, the Army's Office of the General Counsel concluded that a violation of the Buy American Act does not necessarily result in a potential ADA violation. In Report

-2-

Number D-2001-102, "Compliance with Procurement Laws in Purchasing Free Weights and Other Strength Building Equipment," December 27, 2000, the Army non-concurred that a potential ADA violation occurred as a result of a Buy American Act violation.

We have been informed that the Office of the Secretary of Defense General Counsel (OSDGC) will issue an opinion on whether a potential Antideficiency Act violation occurs as a result of a violation of the Buy American Act. If the OSDGC determines that a potential ADA violation occurs because of a violation of the Buy American Act, the Army will initiate investigations to determine whether an ADA violation occurred.

Department of the Navy Comments



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

24 January 2002

MEMORANDUM FOR DEPARTMENT OF DEFENSE ASSISTANT INSPECTOR GENERAL
FOR AUDITING

Subj: DRAFT AUDIT REPORT ON BUY AMERICAN ACT ISSUES ON
PROCUREMENT OF MILITARY CLOTHING (PROJECT NO. D2001CH-
0046)

Ref: (a) DODIG memo of 7 Nov 01

Encl: (1) Detailed Rationale for Positions on Recommendations

Reference (a) forwarded the subject draft audit report. Comments were requested indicating the Department of the Navy positions on the two recommendations contained in the draft audit report. We do not concur in your recommendation to establish special review procedures for solicitations and contract awards for clothing procurements subject to the Buy American Act and Berry Amendment. The detailed rationale for our position is provided in enclosure (1).

We concur in your recommendation to initiate reviews of the potential Antideficiency Act violations for the five Navy contracts listed in Table 4 of the draft report. In accordance with the DoD Financial Management Regulation, Volume 14, the Commander, Naval Supply Systems Command has been requested to complete a preliminary review into possible Antideficiency Act violations for the identified Navy contracts.

A handwritten signature in black ink, appearing to read "WILLIAM J. SCHAEFER".
WILLIAM J. SCHAEFER
Deputy Assistant Secretary of
the Navy
Planning, Programming and
Resources

* Navy's Enclosure (1) on the following two pages.

DEPARTMENT OF THE NAVY RESPONSE
TO
DODIG DRAFT REPORT ON BUY AMERICAN ACT ISSUES ON
PROCUREMENT OF MILITARY CLOTHING
(PROJECT NO. D2001CH-0046)

DODIG RECOMMENDATION #1.

We recommend the Acquisition Executives for the Army, Navy, Air Force, and U.S. Special Operations Command establish special review procedures for solicitations and contract awards for clothing procurements subject to the Buy American Act and Berry Amendment.

Revised
Page 15

DON RESPONSE:

Nonconcur. We do not believe we should establish special review procedures for solicitations and contract awards for clothing procurements subject to the Buy American Act and Berry Amendment. Although the draft report identified five Navy contracts that did not comply with the Buy American Act, no Navy contracts were cited as being in noncompliance with the Berry Amendment. The Department of the Navy believes that provisions of the Buy American Act are important and should be followed on all applicable procurements. However, we have not found evidence of a systemic problem that would warrant additional special review procedures for such procurements at Navy contracting activities. We believe sufficient contracting officer and legal review procedures already exist for these procurements. We recognize that some individual contracting officers may not be sufficiently familiar with the Buy American Act guidance in the FAR and DFARS. We believe this is an indication that additional or refresher training is warranted. Therefore, we have confirmed that the Navy activities involved will conduct refresher training on Buy American Act responsibilities. Additionally, the Naval Supply Systems Command (NAVSUP) Contracting Management Directorate conducts triennial assessments of field activities through its Procurement Performance Management Assessment Program (PPMAP). The NAVSUP PPMAP now includes, as a special interest item, a review of procurements involving domestic and foreign source restrictions, including the Buy American Act and Berry Amendment. On-site training is conducted during the PPMAP, if deficiencies are identified. Accordingly, we believe heightened awareness and adequate training of our procurement and acquisition personnel are the appropriate actions to take to address this matter. As support for our position, on May 7,

Enclosure (1)

Appendix G

2001, we issued a memorandum requesting that Navy contracting activities re-emphasize the importance and significance of the Buy American Act and Berry Amendment to all contracting and acquisition personnel. In addition, on May 14, 2001, we issued a change to the Navy Acquisition Procedures Supplement (NAPS) to address DoD's restriction on the Secretaries of the Military Departments to delegate authority to make determinations in accordance with the Berry Amendment, and rescinded all existing delegations.

DODIG RECOMMENDATION #2.

We recommend that the Assistant Secretaries (Financial Management and Comptroller) of the Army, Navy, and Air Force initiate, for the contracts under their cognizance listed in Tables 4 and 6 of this report, investigations of the potential Antideficiency Act violations arising from the use of appropriated funds to purchase items that do not comply with the Buy American Act or the Berry Amendment, fix responsibility, and if any violations of the Antideficiency Act occurred, comply with reporting requirements in DoD Directive 7200.1 and the DoD Financial Management Regulation. The Assistant Secretaries should also provide a copy of the preliminary review reports and the final formal investigation reports to the IG, DoD.

DON RESPONSE:

Concur. In accordance with the DoD Financial Management Regulation, Volume 14, the Commander, Naval Supply Systems Command has been requested to complete a preliminary review into possible Antideficiency Act violations for the Navy contracts identified in the draft report.

Enclosure (1), cont'd

Department of the Air Force Comments



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

OFFICE OF THE ASSISTANT SECRETARY

24 JAN 2002

MEMORANDUM FOR DIRECTOR OF CONTRACT MANAGEMENT DIRECTORATE,
OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF
DEFENSE

FROM: SAF/AQC
1060 Air Force Pentagon
Washington, DC 20330-1060

SUBJECT: Audit Report on Buy American Act (BAA) Issues on Procurement of Military Clothing (Project No. D2001CH-0046)

On behalf of the Air Force Acquisition Executive, the Air Force concurs with the subject audit report. Additionally, the Assistant Secretary of the Air Force (Financial Management and Comptroller) (SAF/FM) provided separate comments to you. A copy of their reply is attached.

Each Major Command has either developed, or is in the process of developing training and tools to help ensure compliance with the Berry Amendment and the Buy American Act. In order to help ensure consistency across the Air Force, I have directed the contracting policy staff to survey all available training and develop a comprehensive training module on these laws for use throughout the Air Force. This training will cover both pieces of legislation it's history, usage, exceptions, and penalties for non-compliance. I have also directed my staff to review the procedures in the DFARS and the Air Force FAR Supplement (AFFARS) to ensure they contain clear and concise guidance for contracting officers.

Our review of the DFARS and AFFARS will be completed by 15 February 2002. Action resulting from this review will begin immediately. We will complete our survey of training material and develop our training module by 12 April 2002. We will deploy the training across the Air Force by 12 July 2002. My point of contact for this action is Mr. J.P. McCusker, SAF/AQCP, and his e-mail is mccusker@pentagon.af.mil, phone numbers are Commercial 703-588-7031 and DSN 425-7031.



DARRYL A. SCOTT, Brig Gen, USAF
Deputy Assistant Secretary (Contracting)
Assistant Secretary (Acquisition)

Attachment
SAF/FMP memo, 15 Jan 02



Office of the Assistant Secretary

DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

15 JAN 2002

MEMORANDUM FOR ASSISTANT INSPECTOR GENERAL FOR AUDITING
OFFICE OF THE INSPECTOR GENERAL
DEPARTMENT OF DEFENSE

FROM: SAF/FMP
1130 Air Force Pentagon
Washington DC 20330-1130

SUBJECT: DoD(IG) Draft Report, Buy American Act Issues on Procurements of Military Clothing, 7
November 2001 (Project No. D2001CH-0046)

This is in reply to your memorandum requesting the Assistant Secretary of the Air Force (Financial Management and Comptroller) provide Air Force comments regarding potential Antideficiency Act violations cited in the subject draft report.

The Air Force concurs with the recommended action and has begun preliminary review of those items identified that may not comply with the Buy American Act or the Berry Amendment. The Air Force Deputy General Counsel (Fiscal, Ethics & Civilian Personnel) has initially found that (1) there is no reason to conclude that the Air Force Academy committed an Antideficiency Act (ADA) violation, when they purchased athletic shoes that did not comply with the Berry Amendment, because no delivery order exceeded \$100,000; and (2) purchases of foreign made items under the Buy American Act may not have violated the Antideficiency Act, and have been elevated to the Office of the Secretary of Defense, General Counsel for a decision. We have been informed that they will soon issue an opinion that will be consistent with the Air Force General Counsel's conclusions. Estimated completion date: February 2002.

Please contact Mr. Bill Town, SAF/FMPF, 695-0827, if you have any questions or require additional information.

JOHN J. NETHERY
Deputy Assistant Secretary
Financial Operations
(Financial Management)

cc: SAF/FM
SAF/AQC

Atch

United States Special Operations Command Comments



UNITED STATES SPECIAL OPERATIONS COMMAND
OFFICE OF THE ACQUISITION EXECUTIVE
7701 TAMPA POINT BLVD.
MACDILL AIR FORCE BASE, FLORIDA 33621-5323

18 JAN 2002

MEMORANDUM FOR: INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, 400
ARMY NAVY DRIVE, ARLINGTON, VA 22202-4704

SUBJECT: DODIG Draft Audit Report on Buy American Act Issues on Procurement of
Military Clothing (Project No. D2001 CH-0046)

1. The United States Special Operations Command (USSOCOM) non-concurs with the report as written. Application of the foreign acquisition statutes implemented in FAR Part 25 and DFARS Part 225 has always proven difficult due to the complexity of the regulations. It is not surprising that several purchases were made within DOD that did not properly apply the regulations. However, the 34 USSOCOM actions reviewed indicate the problems are not as widespread as outlined in the report.
2. The DODIG auditors reviewed 34 actions written at three USSOCOM sites. (Note – the report indicated that 34 actions were reviewed. When the back-up data was requested the list only contained 33 actions). The actions consisted of delivery orders against Indefinite Delivery Indefinite Quantity (IDIQ) contracts written at USSOCOM, an order placed against a Navy Blanket Purchase Agreement (BPA), delivery orders against General Services Administration (GSA) schedules, and purchase orders.
3. All USSOCOM findings were related to the failure to include DFARS contract clauses or provisions. No improper purchases of foreign goods were made. Of the 33 actions reviewed, we concur that eight actions were missing required clauses or provisions. There appears to be some unfamiliarity in the use of IDIQ contracts and GSA schedules in the report, specifically where the contract clauses would be located and when the determination of foreign content is made. Specific issues are addressed as follows:
 - a. IDIQ Contracts. Five actions from our headquarters buying division (SOAL-KB) were reviewed. Four were delivery orders placed against USZA22-98-D0008 and one was a delivery order placed against USZA22-99-D0004. Both of the contracts were IDIQ contracts. In an IDIQ contract, terms are negotiated and agreed upon, and contractor representations and certifications (provisions) completed, at the time of award. Designated ordering officials may then order products in accordance with the terms of the basic contract. The draft audit report indicated a certification - DFARS provision 252.225-7000, was not present in four orders written against contract USZA22-98-D0008. In this certification the contractor specifies whether they are proposing foreign products or items from a "designated" country. In his proposal, the contractor certified that he was providing domestic products for contract USZA22-98-D0008. The certification is in the contract file. Separate certifications are not submitted with each delivery order. Our understanding is that only the delivery order and the delivery order files were reviewed for this audit. It is not possible to determine the clauses and certifications are in place

SOAL

SUBJECT: DODIG Draft Audit Report on Buy American Act Issues on Procurement of Military Clothing (Project No. D2001 CH-0046)

without checking the original contract files which specifies the terms of all subsequent orders. One order, from Contract USZAA22-99-D0004, was written under commercial product procedures and the certification was not in the original file as required. We concur that this action was missing a required provision.

b. BPA. One order was written against a Navy BPA. To determine if the proper clauses/provisions were present, the BPA would need to be checked, not the delivery order. We were not able to access the Navy BPA.

c. GSA Schedules. Thirteen orders reviewed were delivery orders written against GSA Schedules. GSA schedules are similar to IDIQ contracts. GSA negotiates the basic terms into the schedule when the schedule is let, not when delivery orders are placed. Schedules are written for the entire federal government to use. Contracting officers writing orders against GSA schedules cannot change the terms of the schedule. GSA is bound by the FAR and places FAR 52.225-5 into the schedules to comply with the Buy American Act. FAR 52.225-5 requires domestic materials or material from "designated countries" to be provided. Its application covers all DOD foreign acquisition concerns except for the "Berry" Amendment, which takes effect at \$100,000 for some products. All thirteen GSA orders were correct. They were under \$100,000 and complied with the Buy American Act. Since FAR 52.225-5 was used there is no requirement to add DFARS 252.225-7002 or the accompanying certificate at 252.225-7000.

d. Purchase Orders. Fourteen of the actions reviewed were purchase orders issued by Navy Special Warfare Development Group. All of the purchase orders reviewed were said to be missing provisions 252.225-7000 (required when clause 252.225-7001 is used) and 252.225-7003. Provisions are written certifications stating information about the offeror and their intent to abide with the terms of the contract. FAR 13.106-1(c) allows oral solicitations to be used, a common procedure for actions under \$25,000. Written certifications are not used; all required information is requested over the telephone. The clauses mandating compliance are in the purchase order. The report also listed certification 252.225-7003 as missing. This provision is used when FAR 52.225-8 is used and not normally required for actions under \$100,000. FAR 52.225-8 was not included in the purchase orders. In total, seven purchase orders were over \$25,000 and should have had provision DFARS 252.225-7000 in place (two of these purchase orders also did not have clause 252.225-7002 in place when required). We concur that seven of these actions were missing required clauses or provisions.

4. My POC has discussed our specific concerns with the lead auditor, Mr. Kissner. He is in agreement with our non-concurrence. Overall, we agree with the reports finding that the application of the Buy American Act and the "Berry" Amendment is difficult and deserves additional attention. This has always been a difficult area of the FAR/DFARS to implement. A training session on the proper handling of these issues will be presented at our procurement conference scheduled for 4-6 March 2002. Recommend that DOD consider rewriting DFARS

SOAL

SUBJECT: DODIG Draft Audit Report on Buy American Act Issues on Procurement of Military Clothing (Project No. D2001 CH-0046)

Part 225 to address the application of foreign acquisition clauses to simplified acquisition methods. Perhaps a matrix or a decision tree could be created to help decipher what clauses are needed.

5. My POC for this action is Mr. Craig Bowers. He can be reached at DSN 299-7515 or commercial (813) 828-7515.

Harry E. Schulte

HARRY E. SCHULTE
Acquisition Executive

Audit Team Members

The Contract Management Directorate, Office of the Assistant Inspector General for Auditing, DoD, prepared this report. Personnel of the Office of the Inspector General, DoD, who contributed to the report are listed below.

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Richard B. Jolliffe

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